

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1550

74-1550

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1550

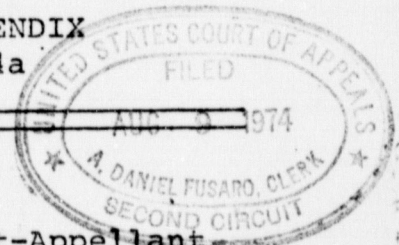
THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
CARMINE TRAMUNTI, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

253 DEFENDANTS-APPELLANTS' JOINT APPENDIX
Vol. T(12) - Pages 1716 to 1894a

HERBERT SIEGAL
Attorney for Defendant-Appellant
Carmine Tramunti
17 John Street
New York, New York 10038
RE 2-5330

NANCY ROSNER
Attorney for Defendant-Appellant
Louis Inglese
401 Broadway
New York, New York 10013
925-8844



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PAGINATION AS IN ORIGINAL COPY

IVAN S. FISHER
Attorney for Defendant-Appellant
Donato Christiano
401 Broadwa
New York, New York 10013
925-5937

ROBERT L. ELLIS
Attorney for Defendant-Appellant
Angelo Mamone
17 East 63rd Street
New York, New York 10021
838-2323

FRANK A. LOPEZ
Attorney for Defendant-Appellant
Joseph DiNapoli
31 Smith Street
Brooklyn, New York 11201
237-9500

THEODORE ROSENBERG
Attorney for Defendant-Appellant
Frank Pugliese
31 Smith Street
Brooklyn, New York 11201
858-0589

KENNETH E. WARNER
Attorney for Defendant-Appellant
Joseph Cerialle
875 Avenue of the Americas
New York, New York 10001
244-4444

ROBERT FISKE
Attorney for Defendant-Appellant
John Gamba
One Chase Manhattan Plaza
New York, New York 10005
422-3400

GEORGE DAVID ROSENBAUM
Attorney for Defendant-Appellant
Vincent D'Amico
51 Chambers Street
New York, New York 10007
BE 3-8120

MICHAEL C. DOWD
Attorney for Defendant-Appellant
Frank Russo
120-10 Queens Boulevard
Kew Gardens, New York 11415
793-2900

ROBERT LEIGHTON
Attorney for Defendant-Appellant
Warren C. Robinson
15 Park Row
New York, New York 10038
267-6016

GARY SUNDEN
Attorney for Defendant-Appellant
William Alonzo
401 Broadway
New York, New York 10013
925-4848

EDWARD PANZER
Attorney for Defendant-Appellant
Hattie Ware
299 Broadway
New York, New York 10007
349-6128

MARTIN JAY SIEGAL
Attorney for Defendant-Appellant
John Springer
250 West 57th Street
New York, New York 10019
586-1414

HARRY POLLAK
Attorney for Defendant-Appellant
Henry Salley
299 Broadway
New York, New York 10007
BE 3-0386

1 rka

2 UNITED STATES OF AMERICA

3 vs.

4 CARMINE TRAMUNTI, et al.

5 New York, February 12, 1974,

6 9:45 a.m.

7
8 Trial resumed.

9 - -

10
11 (In open court; jury not present.)

12 THE COURT: As you know, I tried to set aside
13 some time in the morning for applications. Are there
14 any?

15 MRS. ROSNER: Yes.

16 MR. FISHER: Your Honor, tomorrow morning
17 I need to appeal in the Court of Appeals for this cir-
18 cuit, United States vs. Constantino. I would ask to
19 be excused. Mrs. Rosner would cover my stay. The
20 cross examination of Mr. Barnaba will be concluded.
21 My client Christiano consents.

22 THE COURT: Yes, Mr. King.

23 MR. KING: May we approach the bench, Judge,
24 for the sake of my hearing problem?

25 (At the bench.)

1 rka

2 MR. KING: On the 3500 material I received
3 yesterday, on page 9 of the transcript dated July
4 25, 1973 regarding Harry Pannirello there appears a volun-
5 tary statement by Pannirello: I think that Sinatra,"
6 that is, Gamba, "was busted previously for drugs and
7 did five years' time." I respectfully ask your
8 Honor to instruct the government to in turn instruct
9 the witness Harry Pannirello that under no circumstances
10 is that to be mentioned on direct because my man isn't
11 taking the stand.

12 THE COURT: I understand.

13 MR. CURRAN: That is agreed, your Honor.

14 (In open court.)

15 MR. SIEGEL: Your Honor, I am going to
16 have to absent myself after the morning break. Mr.
17 Panzer is going to cover for me.

18 THE COURT: Is that agreeable with your
19 client?

20 MR. SIEGEL: Yes.

21 MR. PANZER: That is, if Mr. Siegel is
22 finished with his cross examination.

23 THE COURT: He will not absent himself
24 unless he is finished.

25 MRS. POSNER: This is that application that

1 rka

2 you indicated be best made off the record.

3 THE COURT: All right, we will take it up
4 in the robing room.

5 Anybody else have an application?

6 Come into the robing room.

7 (Discussion in the robing room off the record.)

8 (In open court; jury present.)

9 THE COURT: Bring back the witness, please.

10 J O H N B A R N A B A resumed.

11 CROSS EXAMINATION

12 BY MR. SIEGEL:

13 Q Good morning, Mr. Barnaba. My name is
14 Martin Siegel. I represent the accused John Springer,
15 referred to as Hank.

16 Mr. Barnaba, during the year 1973 how much
17 money did you earn from the sale of narcotics?

18 A In '73?

19 Q Yes.

20 A None.

21 Q How about in the year 1972?

22 A None.

23 Q The year 1971?

24 A I don't recollect offhand.

25 Q Getting back to the year 1972, you were ar-

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rka

Barnaba-cross

1719

rested on November 14, 1972?

A Yes.

Q Prior to that date had you earned any money
selling narcotics?

A Yes.

Q Approximately how much had you earned for that
year of '72?

A I don't recall.

Q Do you remember how much money you earned
for the year 1970 from the sale of narcotics?

A No, sir, not offhand.

Q During the year 1970 how much money did you
earn legitimately?

A Legitimately?

Q Yes.

A I couldn't give you that figure even.

Q For the year 1971?

A No, sir.

Q 1972?

A No, sir.

Q Did you file a tax return for any of those years
1970 through 1972?

A I didn't file in '72, no.

Q You didn't file in '72?

1 rka

Barnaba-cross

1720

2 A No.

3 Q Did you file in '71?

4 A I believe so, yes.

5 Q Did you include in the '71 return the money you
6 earned from the sale of narcotics?

7 A No.

8 Q Mr. Barnaba, have you been indicted for viola-
9 tions of the federal tax laws?

10 A No, sir.

11 Q Has any promise been made to you as far
12 as your prosecution of violation of the federal tax
13 laws?

14 A No, sir.

15 Q Mr. Barnaba, during your 20 years of involve-
16 ment in narcotics, has there ever come a time when you
17 sold to a customer just plain milk sugar or sugar or
18 plain mannite instead of including narcotics in your
19 package?

20 A Not that I recollect, no.

21 Q You testified previously that the federal
22 government is paying you approximately \$150 a week now?

23 A Yes, sir -- not the federal government, no.

24 Q The state government?

25 A The state. But that stopped.

1 rka

2 Q Are you receiving any money at this time from
3 any federal-state law enforcement agencies?

4 A The marshals.

5 Q Did you previously testify at any time during
6 this trial you were receiving \$400 a month?

7 A I did.

8 Q Does that include the money being paid for your
9 rent?

10 A Yes.

11 Q Is the \$400 over and above your rent?

12 A Yes.

13 Q Mr. Barnaba, if you can remember for the years
14 1970 through 1973, what was your monthly earnings from
15 legal enterprises?

16 A I already told counsel, I don't recall.

17 Q You previously identified from Mr. Springer's
18 house as having two lines in front of it?

19 A Yes.

20 Q During the year 1973 on how many different
21 occasions were you taken by law enforcement officers to
22 Mr. Springer's house?

23 A None.

24 Q During the year 1972?

25 A None.

Q You testified on Friday that you were first introduced to Mr. Springer who you referred to as Hank back in August of '71?

A Yes.

Q Do you remember that testimony?

A Yes.

Q Do you remember having a conversation with Special Agent Shutes?

A Yes.

Q Do you remember having a conversation with him on or about September 25, 1973?

A It was in September. I don't remember the date.

Q Do you remember at that time telling him that you allegedly met John Springer, who you referred to as Hank, in December, 1970?

A I don't recall, but I may have.

Q Let me refresh your recollection.

I am referring now to 3543.

Do you remember now that conversation with Torrey Shutes?

A Yes.

Q Do you remember telling him at that time you met the accused in August of 1970?

1 rka

2 A Yes.

3 Q Is it now your testimony that you met him in
4 December of 1970 or you met him in August of '71?

5 A August of '70.

6 Q Mr. Barnaba, on or about November 29, 1973 did
7 you also have a conversation with Agent Torrey Shutes?

8 MR. SIEGEL: Your Honor, I am referring to
9 document 3544.

10 MR. CURRAN: It is Government's Exhibit 3544
11 for identification.

12 Q Do you remember having a conversation with
13 Agent Torrey Shutes at that time?

14 A It was in November, yes.

15 Q Do you remember telling him that you met Mr.
16 Springer on or about April of 1971?

17 A No, I don't.

18 Q Does that document refresh your recollection,
19 Mr. Barnaba?

20 A Yes.

21 Q Do you remember telling Agent Torrey Shutes that
22 you met Mr. Springer on or about the first week in April,
23 1971?

24 A Yes. You have it there, yes.

25 Q Do you wish to change your testimony, Mr.

1 rka

Barnaba-cross

1724

2 Barnaba?

3 A Yes, I do. To what?

4 Q Did you meet Mr. Springer in August of 1971
5 or, as you told Agent Torrey Shutes, during the first week
6 of April, 1971?

7 A August of '71.

8 Q Mr. Barnaba, I make reference to Government's
9 Exhibit 3549, a handwritten statement of yours.

10 A Yes.

11 Q I would like to read it and see if it re-
12 freshes your recollection.

13 A Yes.

14 Q Does that refresh your recollection?

15 A Yes.

16 Q Do you remember now making a written state-
17 ment saying that you met Mr. Springer during the last week
18 of April?

19 A No.

20 Q Based on your written statement -- this is
21 your statement?

22 A Yes, but then I corrected it. I put July
23 or August.

24 Q Mr. Barnaba, could you tell me where the cor-
25 rection occurs?

A Sure, I had it up here and it didn't come out.

1 rka

Barnaba-cross

1725

2 Do you see it (indicating)?

3 MR. SIEGEL: Let the record indicate that
4 Mr. Barnaba is making a notation or reference to certain
5 smudges, but, however, the word appearing is the
6 word "April" and it is underlined by Mr. Barnaba.

7 MR. CURRAN: Your Honor, I object to this.

8 THE COURT: What page?

9 MR. SIEGEL: 21.

10 MR. CURRAN: I object to references and
11 reading from a document not in evidence. We have no
12 objection to the document.

13 THE COURT: Go ahead, Mr. Siegel.

14 Q Mr. Barnaba, do you remember having a conver-
15 sation in November of 1972 with District Attorney Frank
16 Rogers, the special prosecutor?

17 A November of '72?

18 Q Yes.

19 A Yes.

20

21

22

23

24

25

1B 2 Q Do you remember at that time telling him that
3 Hank, who you referred to as John Springer, never had any
4 connection, or you never had any narcotics connection
5 with him at all?

6 A No, I don't recall.

7 Q Let me see if I can refresh your recollection.

8 MR.SIEGEL: Your Honor, I am making reference
9 to Government's Exhibit 3550-A, a transcript from a tape
10 recording on page 26.

11 Q "Rogers: What do you know about Hank?

12 "Barnaba: Hank is just a lot of bullshit.
13 You know, he never comes up with a lot of (sounds like)
14 you know, a lot of talk, but through him you could get
15 contacts."

16 Do you remember making that statement?

17 A You got it there. I made it.

18 MR. SIEGEL: Your Honor, I turn to page 27.

19 Q Do you remember being asked this question and
20 giving this answer:

21 "Rogers: What about Hank?

22 "Barnaba: Hank -- I mean -- I would talk to,
23 bu' I haven't seen him in a while.

24 "Rogers: You never transferred anything to
25 him?

kp2

Barnaba-cross

"Barnaba: No."

Do you remember being asked that question and giving those answers?

A If it is there.

Q Would you like to refresh your recollection?

A If you got it there, it is all right.

Q At the time you made that statement, Mr. Barnaba were you lying?

A I didn't look at it as lying. I was holding back.

Q Didn't you previously testify that you had no particular love or concern for, as you said, for the colored people?

A Not that I recall.

Q Don't you remember previously testifying to that, Mr. Barnaba?

A Where was this?

Q In this trial.

A I don't recall that.

Q Mr. Barnaba, do you know a Mr. Faust? Mr. Faust in 1800 sold his soul to the devil --

THE COURT: All right.

Q You don't have to answer the question.

A Do you want to be a preacher, counsellor?

1 kp3

Barnaba-cross

2

THE COURT: Hold it, both of you.

3

MR. SIEGEL: All right, your Honor. No further

4

questions.

5

THE COURT: Mr. Dowd, do you wish to inquire?

6

CROSS EXAMINATION

7

BY MR. DOWD:

8

Q Good morning, Mr. Barnaba.

9

A Good morning.

10

MR. DOWD: Pardon me while I arrange my

11

papers.

12

THE COURT: Surely.

13

Q We have met before, haven't we, Mr. Barnaba?

14

A Yes, sir.

15

Q Mr. Barnaba, you testified on direct examination

16

concerning an alleged incident, a transaction between you

17

and Mr. Russo; correct?

18

A Yes.

19

Q What month did that take place in?

20

A July or August, to the best of my recollection.

21

Q Mr. Barnaba, I would like to show you pages

22

1440 through 42 of the transcript of this trial and ask you

23

to read them and ask you if this refreshes your recol-

24

lection?

25

A -To what?

kp4

Barnaba-cross

Q As to when the alleged transaction between you and Mr. Russo took place.

A Yes, sir.

Q Do you still say it was July or August?

A To the best of my recollection, I would say August.

Q Do you remember being asked this question on February 8 by Mr. Curran?

MR. CURRAN: What page?

MR. DOWD: 1440, line 2.

Q "Q Mr. Barnaba, directing your attention to a few nights later in or about the month of September, 1971, did you again see Butch Pugliese?

"A Yes, at the luncheonette on Brewer Avenue."

Then on page 1441, after you explained a transaction with a Joe Sharp, line 8:

"Directing your attention to a short time after that, a day or a few days after this meeting, did you see Butch Pugliese again?

"A I did, at the afternoon at Izzie's Luncheonette again, and at that time said somebody is going to come here, I want you to meet him. A few minutes later, a fellow did come. It was a fellow named Frank Russo."

— Were you asked those questions and did you

1 kp5 Barnaba-cross

2 make those answers?

3 A Yes, sir.

2 4 Q But today you say it was August and not September,
5 as you said?

6 A It could be August or September.

7 Q Could it be October?

8 A No.

9 Q Could it be July?

10 A No.

11 Q Could it be June?

12 A No.

13 Q Could it be May?

14 A No, sir.

15 Q 1971, this is?

16 A Yes.

17 Q All these months?

18 A Yes.

19 Q It couldn't be July?

20 A No.

21 Q In fact, if you said it was July, you wouldn't
22 be telling the truth?

23 MR. CURRAN: Object to the form of that, your
24 Honor.

25 Q Well, Mr. Barnaba, you wouldn't tell us under

1 kp6 Barnaba-cross

2 oath that it was July?

3 MR. CURRAN: Object to the form of that.

4 THE COURT: Sustained.

5 Q You wouldn't say it was April, 1971, that this
6 transaction took place?

7 A No.

8 Q You wouldn't say May, 1971?

9 A No, I wouldn't.

10 Q That would be incorrect?

11 A To the best of my recollection, yes.

12 Q That would be false?

13 A It is incorrect.

14 Q And you wouldn't say that?

15 A No.

16 Q Do you remember testifying before a federal
17 grand jury on December 5, 1973, Mr. Barnaba?

18 A I remember December, yes.

19 Q Do you remember testifying about Mr. Russo?

20 A No, I don't.

21 Q Do you remember ever testifying before a grand
22 jury about Mr. Russo?

23 A At that time?

24 Q At any time.

25 A - Not that I recall, no.

kp7

Barnaba-cross

Q You never testified --

A I am not saying -- I don't recall.

Q At this time, Mr. Barnaba, I would like to show you 3546.

MR. CURRAN: It is Government's Exhibit 3546.

Q (Continuing) And ask you to read page 12, from line 12 to the end, and ask you if that refreshes your recollection?

A Yes, I recall.

Q That was in December of 1973, wasn't it, Mr. Barnaba?

A Yes, sir.

Q And you said that this transaction at that time took place in May, 1971?

MR. CURRAN: Objection to that, your Honor.

MR. DOWD: All right, your Honor, I withdraw it.

Q Mr. Barnaba, page 12, Government's Exhibit 3546, line 15.

Were you asked this question in the grand jury -- withdraw that.

When you appeared before the grand jury, were you testifying under oath?

A Yes.

Q Were you asked this question, page 12, line 15,

1 kp8

Barnaba-cross

2 by Mr. Phillips:

3 "Q And did you receive from both of them in or
4 about May of 1971, approximately an eighth of a kilo of
5 heroin?

6 "A Yes, from Butchie.

7 "Q And in connection with the transaction, did
8 Russo pay Pugliese \$3000 for the heroin?

9 "A Yes, he did."

10 Were you asked those questions and did you make
11 those answers?

12 A Yes, sir.

13 Q And you say it was in May of 1971, correct?

14 MR. CURRAN: Objection, your Honor. That is
15 not what the question says.

16 THE COURT: I understand what the question
17 says.

18 You were asked those questions and did you
19 give those answers, is that correct?

20 THE WITNESS: Yes.

21 THE COURT: Go ahead.

22 Q So now you say it was August or September,
23 1971, that this happened?

24 A Yes.

25 Q But in December of 1973, you said it was in

Barnaba-cross

1 kp9

2 May?

MR. CURRAN: Objection, your Honor.

THE COURT: Go ahead, answer the question.

A Yes.

Q Was your testimony before the grand jury untrue?

A No.

Q Was your testimony here this morning untrue?

A No. I testified to the best of my knowledge.

Q But your knowledge is changing?

MR. CURRAN: Objection to that. It is argumenta-

tive.

THE COURT: It is.

Q Mr. Barnaba, does your recollection change as to what took place in the past couple of years?

MR. CURRAN: Objection.

THE COURT: I will permit it. Answer it.

A Pardon me?

Q Did your recollection change? Is it changing as to what took place in the past couple of years?

A After that I got together and put notes together.

Q After this?

A I put everything together.

Q After this testimony?

Barnaba-cross

kp10

1 A That was when?

2 Q December 5, 1973.

3 A I don't think it was after that, no.

4 Q So you didn't put notes together after this?

5 A No.

6 Q Your recollection just changed after this?

7 A Yes.

8 Q How many times did it change before this?

9 MR. CURRAN: Objection to the form of that, your

10 Honor.

11 THE COURT: Yes, it is argumentative.

12 Q Did it change before this, before December 5,

13 1973, your recollection of what had happened?

14 A I don't recall.

1 zpl

Barnaba-cross

1736

2 Q Well, Mr. Barnaba, didn't you testify that it was
3 approximately on February 8th on direct examination, did
4 you testify in substance that it was approximately a month
5 after you met Butch Pugliese in front of the Beach Rose
6 Social Club, that you had this transaction with Frank
7 Russo?

8 MR. CURRAN: Objection, your Honor. Asked
9 and answered.

10 THE COURT: No, I will permit it.

11 A Yes.

12 Q Do you remember being interviewed by Agent
13 Torrey Shutes on November 27 through 29, 1973?

14 A I know it was in November. I don't know the
15 date. Yes.

16 Q And you told him in narrative form what happened
17 in respect to this case, correct?

18 A To the best of my knowledge then, yes.

19 Q Didn't you tell him that you had met Butch
20 Pugliese in front of the Beach Rose Social Club in April --
21 the first week in April, 1971?

22 A I may have.

23 Q And didn't you tell him that approximately a
24 month later you met or you had an alleged transaction
25 between you and Mr. Russo in May, 1971?

zp2

Barnaba-cross

1

2

A I may have.

3

Q And that is not true?

4

A We are going back to the notes. I pointed out
later I crossed it out and I in the month of August.

5

6

Q You crossed it out?

7

A Yes, I did.

8

Q I ask you to look at Government's Exhibit 3544,
paragraphs 44, 45 --

9

10

A I am talking about -- I don't know what this
is.

11

12

Q You don't know what this is?

13

A I am talking about my handwritten notes.

14

Q Did you prepare your handwritten notes?

15

A Yes.

16

Q After you had this conversation with Torrey
Shutes?

17

18

A I think it was before.

19

Q Oh, before. Well, do you remember telling
Torrey Shutes that the alleged transaction between you
and Mr. Russo took place in May, 1971?

20

21

A I don't recall it, but I may have told him.

22

23

Q Mr. Barnaba, again I ask you to take a look at
Government's Exhibit 3544 --

24

25

A If it's there, I'll accept it. I accept it.

zp3

Barnaba-cross

Q Do you want to look at it?

A If you say it's there.

Q I want you to look at it.

A It's okay.

Q You did say it?

A I guess so.

Q That was incorrect?

A I told counsellor later on, I changed it in my handwritten notes, I put down what happened.

Q And that is what I have asked you.

A Yes.

Q You say you made your notes after you had this interview on November 27th and 29th with Torrey Shutes?

A Yes.

Q And this incident took place approximately a month after you met Butch Pugliese in front of the Beach Rose Social Club?

A August.

Q And allegedly when you discussed the availability of drugs, when you met with Pugliese at the Beach Rose Social Club?

MR. CURRAN: I object to the form of that question, your Honor.

MR. DOWD: I will withdraw it, your Honor,

1 zp4

Barnaba-cross

2 sorry.

3 Q This transaction with Mr. Russo allegedly took
4 place about a month after you met Butch Pugliese at the
5 Beach Rose Social Club?

6 MR. CURRAN: Your Honor, that has been asked
7 and answered at least twice. I object.

8 THE COURT: It has been asked and answered.

9 Q Mr. Barnaba, did you also have an interview
10 with Mr. Shutes, Torrey Shutes, on September 21 and Sept-
11 ember 25, 1973?

12 A It was September. I don't know the date.

13 Q And you remember telling Agent Shutes when you
14 met Butch Pugliese in front of the Breach Rose Social Club?

15 A I remember telling him about it.

16 Q Do you remember telling him it was December,
17 1970?

18 A No.

19 Q I show you Government's Exhibit 3543 and ask
20 you to look at paragraph 12. I ask you if that refreshes
21 your recollection as to what you told Agent Shutes?

22 A Yes.

23 Q Now, in September you did not tell Agent Shutes
24 about Mr. Russo, did you?

25 A Not that I recall.

1
2 Q In fact, the first time you told anybody about
3 Mr. Russo was in the November meeting with Mr. Shutes,
4 wasn't it?

5 A Probably.

6 Q Do you remember having an interview when you
7 were arrested with Mr. Rogers? You have been asked a
8 lot of questions about this. The date when you were
9 arrested.

10 A Yes.

11 Q Did you tell Mr. Rogers that you had this
12 transaction with Mr. Russo on that date?

13 A Not that I recall.

14 Q Do you remember talking some time with Mr.
15 Rogers that evening, don't you?

16 A Yes.

17 Q In fact, you had been shown this 148-page
18 transcript a couple of times?

19 A Yes, sir.

20 Q As to your conversation?

21 A Yes.

22 Q It was a lengthy conversation?

23 A Yes, sir.

24 Q And you told, do you remember telling Mr. Rogers
25 at that time that you were going to level with him and

1

zp

Barnaba-cross

1741

2

you weren't going to lie, early in the conversation?

3

A I don't recall it, but if it's there I said

4

it.

5

Q Government's Exhibit 3550-A, Mr. Barnaba, I

6

would like to show you page 9, and ask you if this

7

refreshes your recollection? Does that refresh your recol-

8

lection?

9

A Yes.

10

Q That you weren't going to lie, you were going

11

to level with Mr. Rogers?

12

A Yes.

13

Q You told him that at least?

14

A If it's there, I told him.

15

Q Do you remember Mr. Rogers later on saying,

16

if you didn't know anything, you weren't any use to him,

17

right?

18

A Yes.

19

Q But you said you were not -- you told us earlier

20

in your testimony that in fact you were not leveling with

21

Mr. Rogers, right?

22

A That's right.

23

Q In fact, you were lying to him about --

24

A I don't look at it as lying. I was holding

25

back.

1 Q Do you remember, Mr. Barnaba, telling Mr. Rogers
2 that in 1970 you did not do anything in narcotics?
3

4 A I may have said it.

5 Q Was that the truth?

6 A No.

7 Q That was a lie?

8 A I told you, I didn't look at it as a lie.
9 I was holding back.

10 Q Now, I believe -- do you remember being asked --
11 telling Mrs. Rosner yesterday when she was questioning you
12 that prior to your arrest in November, 1972, you hadn't
13 been dealing in narcotics in the summer of '72?

14 A I said there was conversation. There was no
15 transaction.

16 Q No transaction.

17 Do you remember telling Mr. Rogers in November,
18 1972, that you were dealing in heroin and coke in August,
19 1972?

20 A No, I don't recall.

21 Q I show you page 23 of Government's Exhibit
22 3550-A and ask you if that refreshes your recollection.
23 It refreshes your recollection?

24 A Yes.

25 Q You told him you were dealing in heroin

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Barnaba-cross

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2 and coke in August, '72?

3 A If it's there.

4 Q Explain to me, were you holding back at this
5 time?

6 A I don't remember what I said that night unless
7 I read it. I may have said anything.

8 Q You may have lied that night?

9 A Possible. I was in a state of confusion.
10 I have already testified to that.

11 Q Were you in such a state of confusion that
12 night that in fact you were telling the truth, you did not
13 have time to think about your lie? It is possible you
14 were in such a state of confusion in fact you were telling
15 the truth?

16 MR. CURRAN: That has been asked and answered.

17 THE WITNESS: I just answered that.

18 Q Now, Mr. Barnaba, on that same night, do you
19 remember being asked a series of questions about who you
20 were dealing with in heroin, in narcotics, by Mr. Rogers?

21 A I don't recall it, but if it's there, I was
22 asked.

23 Q Mr. Barnaba, I show you pages 75, 76 and 77
24 of Government's Exhibit 3550-A and ask you to look them
25 over and tell me whether that refreshes your recollection?

Does it refresh your recollection?

A Yes. It doesn't, but if it's here, I said it.

Q Do you remember being asked a series of names of people you dealt with or giving a number of names?

A Yes.

Q And you didn't give Frank Russo's name, did you?

A No.

Q Then you remember that Rogers asked you, are there any more, and you said, there are no others, do you remember that?

A Yes.

Q And perhaps in your state of confusion you were telling the truth at that time?

MR. CURRAN: Objection, your Honor.

THE COURT: I will sustain it.

Q Do you remember talking to Mr. Rogers at least several times during that conversation, saying to him in effect, "Tell me what you want me to do, and I'll do it," don't you?

A I told you before, I don't remember anything that happened that night. When I read it, then it must have happened.

Q You don't remember a thing about that night?

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A No, sir.

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Q By the way, over this year has your recollection
about that night changed?

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A No.

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Q Mr. Barnaba, do you remember making these statements, page 72, Government's Exhibit 3550A, having this conversation with Mr. Rogers on that night:

"Barnaba: I can't tell you offhand. I've got to have time. I just can't. I can't begin to tell you. I'm going to do this. I can't.

"Rogers: John, I got to make a decision in the next hour or so, right? What's the charges, what's the bail, right, and it's based upon your willingness to cooperate with us. I know what you know, I know 50, 60 per cent of it, right? I can't possibly be inside your mind. I know basically whether you are leveling with me or not.

"Barnaba: I will tell you what I'll do. I'll work with you, allright. Feed it to me. You tell me what you want, I'll get it for you, but there's got to be a condition I can't go into, I've got to have, you got to let me go out of here. You can't put bail on me?"

Do you remember that?

A Yes, I remember it.

Q Rogers wanted to put you back out in the street, right, wanted you to work for him?

A Yes.

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Barnaba-cross

2 Q He wanted you to go around to people that you
3 knew, your acquaintances, your friends, and see if
4 you could get narcotics, right?

5 A I guess so, yes.

6 Q He wanted you to have discussions with them
7 about drugs, right?

8 A No, he didn't say that in words?

9 A No.

10 Q But he wanted you to go out with an undercover
11 agent, right?

12 A He didn't say it at the time.

13 Q But he told you after that he wanted you to do
14 that, right?

15 A I think so. I don't really recall.

16 Q You did go out with an undercover agent,
17 didn't you?

18 A Yes, sir.

19 Q And you did this voluntarily, correct, Mr.
20 Barnaba?

21 A Yes, sir.

22 Q You just went around to various people that
23 you knew trying to see if you could get them to sell
24 you something, some narcotics, correct?

25 A Yes.

2 A Yes.

3 Q Did you do this because you were tired of your
4 life of crime?

5 MR. CURRAN: Objection, your Honor.

6 THE COURT: Sustained.

7 Q Did you do this because you wanted to reform
8 yourself?

9 MR. CURRAN: Objection, your Honor.

10 THE COURT: Sustained.

11 Q Didn't Mr. Rogers tell you that the quantity of
12 people that produced in terms of narcotics transactions
13 would bear on what charges were placed against you and
14 what sentence you got?

15 A You say the quantity or quality? Did you
16 say quantity or quality?

17 Q Let's try quantity first.

18 A I don't recall that.

19 Q What about quality?

20 A I don't recall that either.

21 Q But part of your job was to see if you could
22 entice people that you knew into dealing with you in nar-
23 cotics, correct?

24 MR. CURRAN: I object to that, your Honor.
25 That's been asked and answered.

MR. DOWD: No, it hasn't, your Honor.

THE COURT: I'll permit it. Go ahead.

Q Correct?

MR. CURRAN: I object to the word "entice,"
your Honor.

THE COURT: On that ground I will sustain it.
Reframe your question.

MR. DOWD: Your Honor, I would like to
approach the bench.

THE COURT: All right.

(At the side bar.)

MR. DOWD: I submit, your Honor, the word
"entice" is going to become very important in this case
very shortly. As I pointed out off the record, Mr.
Barnaba was present with agents of the federal government --
of the state government in transactions, you know, which
happened -- it could be an issue. Entice is a perfect
word.

THE COURT: This has nothing to do with this
case, though.

MR. DOWD: It may not.

MR. CURRAN: Your Honor, entrapment is not
going to be an issue. If it is going to be an issue
it can't be raised by the word "entice." It seems to

me he can ask the witness what he did, what he set out to do, but "entice" has connotations to it that call for legal conclusions, which is an attempt to put words in the witness' mouth, which may or may not be true.

MR. DOWD: The point is I asked him a question with a word which is defined in every dictionary in the world. It encompasses any concept beyond any legal concept. As far as I know, there is no statutory definition in the federal courts of entrapment.

THE COURT: My problem is I think it is a loaded word which is really unnecessary to get out what you want. As such time as you sum up you can use the word "entice" or anything else, and that's the time to bring out these things. I just don't think it's proper at this point.

MR. DOWD: He is about to say yes.

THE COURT: That might be.

MR. DOWD: I am asking him what he did: did he try to entice people. I think that's a perfectly proper question. If I ask him -- he knows what the word means. I don't think it is any kind of conclusion. It's asking him what he did.

MR. CURRAN: I will withdraw my objection if Mr. Dowd wants to define the word "entice" as he

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2 understands it before he asks the question of the witness.

3 MR. DOWD: Can you get me a dictionary?

4 I will define it.

5 MR. CURRAN: It's not my question.

6 MR. DOWD: Give me a dictionary. I'll
7 tell you what it means.

8 MR. CURRAN: It calls for a conclusion on the
9 part of the witness.

10 MR. DOWD: I am asking him what he did.

11 THE COURT: You can frame the question
12 without using the word "entice."

13 How much longer are you going to be?

14 MR. DOWD: About five minutes.

15 THE COURT: I want to figure out when to have
16 a break. I don't want to break in the middle of a
17 witness. See if you can't do it without the word
18 "entice."

19 MR. DOWD: Promote?

20 THE COURT: Why don't you use the words
21 "get your friends to"? Isn't that so much simpler?

22 MR. DOWD: Okay.

23 (In open court.)

24 Q Mr. Barnaba, subsequent to your conversations
25 with Mr. Rogers beginning on November 14, 1972, the date

1 of your arrest, did you go out into the street to try
2 to get your friends to deal with you in narcotics trans-
3 actions?
4

5 A I went out to get deals, yes.

6 Q You went out in your own mind to promote
7 transactions between you and people that you knew?

8 A Yes.

9 Q And you did this to help yourself, didn't you?

10 A Yes.

11 Q To show Mr. Rogers that you were cooperating
12 with him?

13 A Yes.

14 Q -- Because in your mind you felt this would
15 bear on how you were going to be treated by the court and
16 the judge in respect to the charges against you, correct?

17 A The charges?

18 Q Yes.

19 A I wasn't thinking about charges; I was think-
20 ing about sentence.

21 Q You thought this would help you with the judge?

22 A Yes.

23 Q Did anyone tell you this would help you?

24 A No.

25 Q Mr. Rogers didn't mention it?

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A No.

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Q So at that time you had no -- you really had

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no idea that going out and seeing if you could get

5

your friends to involve themselves in narcotics trans-

6

actions with you would help you?

7

A If I had an idea?

8

Q Did you have an idea that it would help?

9

A Yes.

10

Q But nobody told you this?

11

A No.

12

Q Tell me, Mr. Barnaba, did you ever engage in

13

taking numbers, policy?

14

A --Yes, I did.

15

Q Can you tell me when?

16

A In '62 to about '66.

17

Q Were you ever arrested for that?

18

A No.

19

Q Did you make a lot of money from it?

20

A I made money.

21

Q Going back to the man before me who was asking

22

questions, Mr. Siegel, did you declare that on your income

23

tax return?

24

A No, sir.

25

Q Did you make false returns in those years?

1 A I filed my income I was earning on the car lot.

2 Q In other words, you made false returns?

3 A I guess you could call it that.

4 Q What would you call it, withholding information?

5 MR. CURRAN: I object, your Honor.

6 THE COURT: I'll sustain the objection.

7 MR. CURRAN: That's withholding tax, your
8 Honor, that's different.

9 MR. DOWD: Mr. Curran said withholding tax.

10 MR. CURRAN: I also said that's different,
11 your Honor.

12 Q Maybe we should clarify what Mr. Curran is
13 saying.

14 THE COURT: Let's not.

15 Q Now, what's a Shylock?

16 A A what?

17 Q A Shylock.

18 MR. CURRAN: Your Honor, I'm going to object
19 to this.

20 THE COURT: Yes, I think it's way out.

21 MR. DOWD: Your Honor, may I make an offer
22 of proof?

23 THE COURT: All right. Come on up.

24 (At the side bar.)
25

2 THE COURT: All right.

3 MR. DOWD: I am beginning these questions
4 because I have a prior statement made by Mr. Barnaba
5 that in fact he was shying with somebody using \$20,000
6 of somebody else's money which he was using out on the
7 street, and the word is "shying." Therefore, I think
8 I have to start out by going into what is a Shylock
9 and bring him into "shying," because it's a slang word,
10 in order to successfully use this.

11 MR. CURRAN: Whether Mr. Dowd has the statement
12 or not, it is irrelevant. I have been extremely liberal,
13 I think, in not objecting to all these questions about the
14 numbers back in '62 and tax return statements which are
15 not admissible. I let it go but I will draw the line
16 somewhere.

17 MR. DOWD: Implicit in the Shylocking
18 business is the use of force to collect, because I can't
19 go into court unless there is an immoral act of the
20 witness prior to his testimony.

21 MR. CURRAN: Mr. Dowd is not entitled under
22 the rules here to bring out prior immoral acts unless they
23 amount to convictions, and I haven't objected heretofore
24 but I think we have gone far enough and from now on I
25 am going to object.

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MR. DOWD: I think also it bears on the
credibility of the witness, the fact that he is a
Shylock.

MR. CURRAN: I will make the same statement,
your Honor.

THE COURT: Credibility can be attacked but
it has to be attacked under certain rules and the rules
here do not permit you to go into prior immoral
acts. I was surprised that you got into income tax, I
must admit, but I'm not running this trial in the sense
I am not running anybody's case for him. I am here to
be the judge and I'm not going to get involved in anything
like this. It is pretty far out but I don't think you
can get into Shylocking if this man has been Shylocking.
It's got no place in this case.

MR. DOWD: Your Honor, implicit in that is
the use of violence. It tends to bring it to
the fore here the character of this man, who has
denied previously in effect, in substance, that he
ever had a gun or in substance that he was a violent
person.

MR. CURRAN: Onceding arguendo that Mr.
Dowd is right on what he just said, I still maintain that
he has no right to bring out prior immoral acts. In-

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deed, he has already gone far beyond and the government
hasn't objected --

MR. DOWD: I will read him his prior state-
ments --

THE COURT: What's the prior statement?
Is it a 3500 statement?

MR. DOWD: It's in respect to an order, a wire
tap order, a request for a wire tap order.

MR. CURRAN: There has to be a foundation
laid to bring out prior alleged inconsistent state-
ments. I don't think you can just start reading
statements.

THE COURT: I don't have the statement.
Would somebody be good enough to bring me the state-
ment?

MR. DOWD: I'll bring it. --
Conversation between him and Frank Monaco.
I can bring this in in another way. Start with line 15
down.

THE COURT: I still don't see how you can
get into it.

MR. CURRAN: No foundation.

MR. DOWD: I think the foundation can be
ask him about his conversation with Frank Monaco in

1 September, 1972; did they discuss narcotics; did they
2 discuss any other illegal activities. If he says no,
3 I think I can use it to impeach him.
4

5 MR. CURRAN: Your Honor, I submit that Mr.
6 Dowd can't take somebody and set him up on cross examina-
7 tion and attempt to make him, in effect, his own wit-
8 ness for one purpose and then cross examine him on using
9 material that is not proper cross examination material in
10 this court.

11 MR. DOWD: Your Honor, this court, as a
12 matter of fact, with the changes in the rules of evi-
13 dence, and since doing away with the entire concept of
14 hostile-friendly witness in order to gain the truth, no
15 question he is a hostile witness --

16 THE COURT: I am going to give the jury a
17 break now so we don't have to sit here and whisper.
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(In open court.)

THE COURT: Ladies and gentlemen, we have a legal problem which came up. This is a good time for the morning break. I will ask the marshal to escort the jury out.

(The jury left the courtroom.)

THE COURT: Mr. Dowd, Mr. Curren, why don't you come into the robing room and bring that document with you.

(In the robing room.)

THE COURT: Mr. Dowd, Mr. Curran, Mr. Phillips and Mr. Lopez are here.

MR. DOWD: Your Honor, what I was saying before if I think I can bring this up. If you object to me bringing up the straight subject of Shylocking by asking him about his conversations with Frank Monaco in September of 1972, whether he talked about any other activities than narcotics, and he will probably say no and I could impeach him with this statement, and I think it is perfectly proper cross examination --

MR. LOPEZ: May I just add something. I see your Honor is reflecting on what he is saying. I think the Shylocking aspect of this case may be important. There are several statements that were made

1 by Barnaba attributed to Pugliese. For instance, that
2 he is partners in everything else. We know that one of
3 the defendants in this case, Joseph DiNapoli is serving
4 time for Shylocking, so that the whole picture of
5 Shylocking may well enter into this case.
6

7 Not only does it affect possibly the credibility
8 and believability of the witness, if he was involved in
9 Shylocking or these types of things, it might affect
10 his character and his veracity as far as the triers
11 of the facts are concerned. But I think the first
12 question that would have to be posed to this witness is
13 whether he knew what Shylocking was.

14 So on two aspects, we may have a Shylocking
15 issue in this case, to explain certain inferences being
16 raised by the evidence. We may also have the factor
17 that we may wish to discredit a particular witness because
18 of his interest in Shylocking.

19 THE COURT: You are bringing out things --

20 MR. LOPEZ: That is why I used the word
21 "may." I hope I am not placed in that bind.

22 THE COURT: The whole thing is very dangerous.

23 MR. LOPEZ: I agree.

24 MR. CURRAN: Now, your Honor, I suppose I am
25 answering two points. Mr. Dowd's point, as I understand

1 it, he is entitled to bring out prior immoral acts to
2 impeach a witness. My position on that, this circuit,
3 in this district, he is not allowed to and I think the
4 law is well settled.
5

6 With respect to Mr. Lopez, what may or may not
7 be a part of the case, that is awfully difficult to respond
8 to but I don't know that Mr. Lopez has made any nexus to
9 what Mr. Dowd wants to do here with Mr. Barnaba.
10 Anything may come up in the case.

11 MR. DOWD: We have discussed the case.

12 MR. CURRAN: I understand, but there is no
13 bridge from what Mr. Lopez said to what Mr. Dowd wants to
14 do.

15 MR. DOWD: The aspect of the gambling policy
16 and the like has certainly come into this case through
17 the testimony of Frank Stasi. In terms of cross examina-
18 tion of him about the fact that in fact if anything these
19 defendants were pseudo gamblers, moneylenders and in fact
20 not narcotics dealers, and that a lot of testimony
21 in fact, a lot of the alleged statements, could refer to
22 something other than narcotics and in addition to which
23 I bring up the fact, entirely different, I think I
24 can properly ask him on cross examination about his conver-
25 sations with Frank Monaco, who is a co-conspirator in this

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Barnaba-cross

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2 case.

3 THE COURT: All right, I understand the
4 issues. Let me think about it.

5 (Recess.)

6 (In open court; jury present.)

7 (At the side bar.)

8 THE COURT: I have considered the problem.
9 I did some reading on it. I decided that I think it is
10 just too remote, far removed, at this point to get into
11 the entire area.

12 MR. DOWD: It was during the period of 1972.

13 THE COURT: I am aware of that.

14 (In open court.)

15 MR. DOWD: I respectfully except.

16 THE COURT: Sure.

17 (In open court.)

18 BY MR. DOWD:

19 Q Mr. Barnaba, prior to your testimony here in
20 this case you had discussed your testimony with Mr. Cur-
21 ran and Mr. Phillips, hadn't you?

22 A Yes.

23 Q You discussed what you were going to
24 testify about, correct?

25 A We went over the testimony.

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Q They asked you questions and you gave them answers?

A Yes.

Q They asked you the questions they said they would ask you at the trial?

A I don't know if they were going to ask me at the trial. They asked me questions.

Q You began to tell them about numerous narcotics transactions that you participated in in 1970, '71 and '72, correct?

A I wrote them down.

Q But you told them that you would testify about those things, correct?

A Yes, sir.

Q Did they tell you that they weren't going to prosecute you for those things that you were testifying about?

A No, never told me that.

Q In other words, they told you: what you are testifying about today, they may prosecute you for?

A No.

Q No.

A What Mr. Phillips told me, he would go before the judge and inform him of the extent of my

cooperation and the rest was up to the judge.

Q Did he also tell you he would give you an airline ticket, relocate you?

A No.

Q Are there any charges pending against you in a federal court concerning any of the transactions which you have described to us on direct examination?

A Not that I know of.

Q In other words, by testifying to all of these transactions you were in effect getting a free ride for all that you did?

A I didn't say that.

Q But you are, aren't you?

A Not that I know of. It's up to the judge.

Q But you haven't been charged with anything you have told us about?

A Here in federal court?

Q Here in federal court.

A Not that I know.

Q And you really don't know whether you are going to be charged with all of those transactions?

A I don't know.

Q It hasn't been discussed with Mr. Phillips and Mr. Curran?

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A I believe Mr. Phillips did tell me at one time I wouldn't be prosecuted here.

Q So you are getting a free ride in respect to all that are testifying about?

MR. CURRAN: I object to that as argumentative.

THE COURT: Yes.

Q So in your own mind, Mr. Barnaba, you want to testify to as much as you could to possibly protect yourself from prosecution?

MR. CURRAN: Objection. Object to the form.

THE COURT: Go ahead, answer it.

A Would you repeat it.

Q In your own mind did you want to testify to as much as you could to protect yourself from prosecution in this court?

A Well, like it was brought out, Mr. Rogers told me 50 years. To me that is life.

Q Let's go back to that a second.

In your conversations with Mr. Rogers do you remember that initially he kept saying, "Frank, you are kidding me, you are not telling me everything"?

A My name isn't Frank.

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Barnaba-cross

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2 Q I am sorry, John.

3 Do you remember him telling you that?

4 A Telling me what?

5 Q Telling you that you weren't coming clean
6 with them, that you knew more, that you could tell
7 them more?

8 A I read it, yes.

9 Q Didn't you understand at that time that if you
10 were going to get any break at all, you better tell them
11 more, right?

12 A I would have to tell them more? No.

13 Q --You didn't understand that?

14 A No.

15 Q Subsequent to Mr. Rogers' conversations with
16 you you told us you went out in the street to see your
17 friends, to see people you knew, to see if you could get
18 them to engage in narcotics transactions with you,
19 correct?

20 A More or less, yes.

21 Q And you saw a great many people, didn't you?

22 A Yes.

23 Q Sometimes you succeeded and sometimes you
24 failed, right?

25 A Yes.

1 Q Did you discuss with the U. S. attorney,
2 Mr. Phillips, Mr. Curran, what you might be prosecuted
3 for in the federal court?
4

5 A No.

6 Q Did you tell them what criminal activities
7 you might have been involved in?

8 A No, sir.

9 Q You didn't tell them what you might have been
10 involved in, what criminal activities you were involved
11 in?

12 A I don't understand that.

13 Q Did you tell them what things you might have
14 done which you would have considered illegal, against
15 the law?

16 A You mean of things that I had done?

17 Q Yes.

18 A Outside of narcotics transactions you are
19 talking about?

20 Q Yes.

21 A I don't recall telling them.

22 Q Do you remember being asked by Mr. Rosen-
23 berg yesterday about taking a bag up to Tardi's?

24 A Yes.

25 Q In respect of of the transaction which allegedly

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2 occurred with Frank Russo?

3 A Yes.

4 Q Do you remember telling him that you didn't
5 look inside the bag?

6 A Yes.

7 Q Actually of our own knowledge, you didn't know
8 what was inside the bag?

9 A I didn't see it, no.

10 Q Of your own knowledge, it could have been
11 sugar in the bag?

12 A It could have been anything, yes.

13 Q It could have been flour?

14 A It's possible.

15 Q Sand?

16 A It's possible.

17 Q Salt?

18 A It's possible.

19 Q Bicarbonate of soda?

20 A Heroin.

21 Q A lot of possibilities?

22 A Sure.

23 Q But you don't know, do you?

24 A No.

25 Q In June or July of 1972 did you get \$15,000 to

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buy heroin from a person named Jimmy?

A Yes, I did.

Q Did you give him the heroin?

A No.

Q Did you give him the \$15,000 back?

A No.

Q You kept that?

A I gave him 7500 back.

Q -You kept 7500?

A Yes.

Q For the effort you had made?

A What do you mean by effort?

Q For trying to get it.

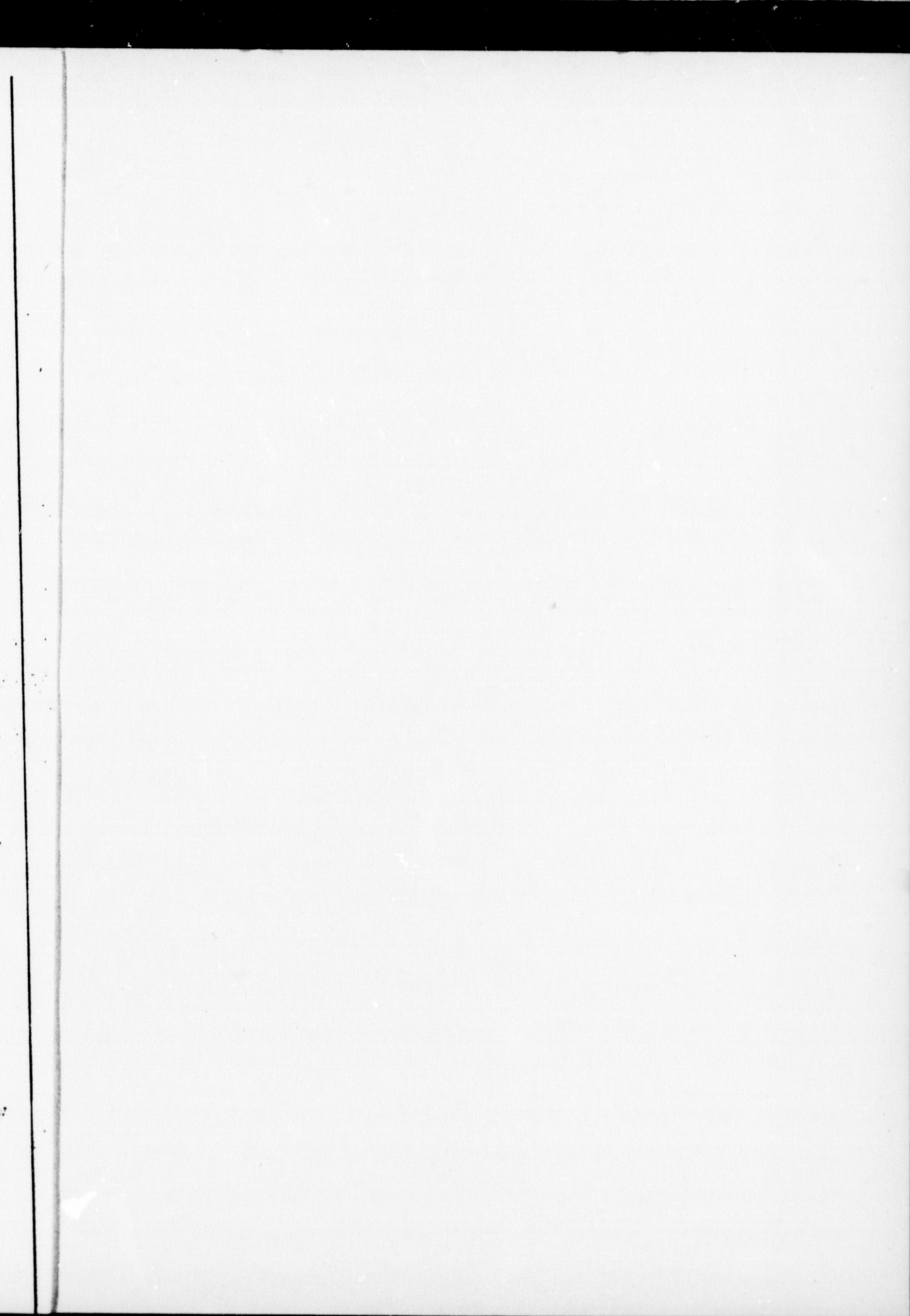
A I never had a chance to return it. I got arrested.

Q Subsequent to your arrest didn't you take money from people, Mr. Barnaba, for the purpose of heroin and never deliver the heroin and keep the money?

A Not that I recall, no.

Q In other words, it may have happened or it never happened?

A I don't think it happened. If you could show it to me, show it to me.



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Barnaba-cross

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2 Q Do you have any records? Do you have any
3 writings?

4 A Do you have a record that I did?

5 MR. DOWD: Your Honor, I ask that that be
6 stricken?

7 THE COURT: It will.

8 A My answer to that is, no.

9 Q It is now "No"?

10 A That is right.

11 MR. CURRAN: I object to the "now."

12 THE COURT: I will permit it.

13 Q Again going back to your testimony before a
14 grand jury in December, 1973, did you ever say in that
15 grand jury, before that grand jury at any time, that
16 Frank Russo had gotten any heroin?

17 A I don't recall any testimony before the grand
18 jury.

19 Q Let me show you Government's Exhibit 3546, page
20 12, and ask you to start reading, I think at line 15 --
21 read the whole page.

22 -- Does that refresh your recollection as to your
23 testimony before the federal grand jury?

24 A I think I went over this before with you.
25 I acknowledged that.

1 kp2

Barnaba-cross

1770

2 Q That it was your testimony?

3 A Yes.

4 Q And that you didn't say here that Frank Russo
5 had gotten any heroin?

6 A If it is not there, I didn't say it.

7 MR. DOWD: No further questions -- withdrawn.

8 Q That was your only testimony about Frank Russo
9 before a federal grand jury, is that correct?

10 A -- I don't recall.

11 Q There might have been other times?

12 A It is hard to say. To the best of my recol-
13 lection, I don't recall.

14 Q How many times did you testify before a grand
15 jury, federal grand jury?

16 A -- Twice.

17 Q I show you Government's Exhibit 3545, the
18 grand jury testimony of October 2, 1973.

19 Read it, Mr. Barnaba, see if that refreshes
20 your recollection as to whether you testified about Frank
21 Russo in October of 1973.

22 A -- Do you want me to read the whole thing?

23 Q To refresh your recollection.

24 A The last one you handed me, I didn't go through
25 the whole thing, you know, I looked on one page.

1 kp3

Barnaba-cross

2 Q I am sorry, Mr. Barnaba.

3 I am giving you Government's Exhibit 3546, too.

4 Tell me if that refreshes your recollection of any other
5 testimony before a federal grand jury about Mr. Russo.

6 A Frank Russo was mentioned here.

7 Q That is the one I just showed you before. That
8 is December?

9 A Yes.

10 Q — Look at October.

11 Does that refresh your recollection?

12 A Yes.

13 Q You testified only in December about Frank Russo
14 correct?

15 A Yes.

16 Q And you didn't testify at that time that he
17 received any heroin, did you?

18 A No.

19 MR. DOWD: No further questions.

xx 20 (Court's Exhibit 62 marked for
21 identification.)

22 THE COURT: Mr. Lopez?

23 CROSS EXAMINATION

24 BY MR. LOPEZ:

25 Q Mr. Barnaba, my name is Frank Lopez and I

1 kp4

Barnaba-cross

2 represent the defendant Joseph Di Napoli. I want to show
3 you Government's Exhibit 50, a photograph, and ask you
4 if you can identify the person on that photograph?

5 A No, sir.

6 Q Yesterday I believe you testified, or Friday you
7 testified to the fact that you had certain dealings with a
8 person by the name of Lessa in October of 1970, isn't that
9 correct?

10 A --Yes, sir.

11 Q And that he told you that the source of his
12 supply was Vincent Papa, isn't that correct?

13 A Yes, sir.

14 Q If I were to suggest to you that the government
15 is claiming that Government's Exhibit 50 is Vincent Papa,
16 would that refresh your recollection?

17 MR. CURRAN: Object to the form of that.

18 Q Does the name Vincent Papa --

19 THE COURT: First of all, don't you think you
20 ought to go about it the other way around?

21 MR. LOPEZ: I will withdraw the question.

22 Q If I told you that was Vincent Papa, would that
23 refresh your recollection?

24 A I never met the man.

25 Q So that as far as what Lessa told you, that his

kp5

Barnaba-cross

supplier was Vincent Papa, you don't know that for a fact of your own knowledge?

A I only know what he told me.

Q Just what he told you?

A Yes.

Q And you don't know whether it is true or not?

MR. CURRAN: Objection. It has been asked and answered.

THE COURT: I will permit it.

Q And you don't know whether it was true or not?

A I assume he is telling me the truth.

Q You are just assuming?

A Yes.

Q Have you ever had any dealings with Vincent Papa yourself?

A I just stated I don't know the man.

Q Let's go to the defendant Joseph Di Napoli. I believe you testified on Friday, October, 1971, Frank Pugliese told you that he was his partner?

A Yes, sir.

Q In everything but the cottage inn?

A Yes, sir.

Q Those were his words, is that correct?

A Yes.

1 kp6 Barnaba-cross

2 Q Those were his words, is that correct?

3 A Yes.

4 Q And I believe you also testified that in
5 December of 1971, Pat Dilacio told you that Di Napoli's
6 parnter was Butch Mamone, is that correct?

7 A Yes.

8 Q You testified in the grand jury on October 2,
9 1973, and I show you Government's Exhibit 3545.

10 Did you ever mention any of those two statements
11 in regard to Di Napoli before the grand jury on October 2,
12 1973?

13 A Not that I recall, no.

14 Q I show you 32 pages of handwritten notes,
15 Government's Exhibit 3549. In those 32 pages of your own
16 handwriting and your own notes, did you ever mention any
17 of those two statements?

18 A No, sir.

19 Q I show you a debriefing with Special Agent
20 Torrey R. Shutes, 21 pages of typewritten notes and 62
21 paragraphs. I ask you if you ever mentioned any of those
22 two conversations in that debriefing?

23 A No, sir.

24 Q I show you the minutes of the grand jury,
25 Government's Exhibit 3546, dated December 5, 1973, about

kp7

Barnaba-cross

1 a month and a half, two months ago. Did you ever mention
2 any of those two conversations?
3

4 A No, sir.

5 Q You also testified that in December of 1971,
6 you went to Pat Dilacio's apartment?

7 A Yes, sir.

8 Q And you were attempting to purchase drugs, is
9 that correct?

10 A Yes.

11 Q And Pat Dilacio told you in December, 1971,
12 that he --

13 A Just a minute, it wasn't December.

14 Q December, 1971?

15 A No. It was November.

16 Q Referring to the trial record page 1461, this
17 was Friday.

18 Do you remember what you testified to on Friday

19 A Yes, vaguely.

20 Q Were you asked this question by Mr. Curran and
21 did you give this answer:

22 "Q Now directing your attention towards the end
23 of December, 1971, or beginning of December, 1971, were
24 you again in Patty's apartment on Pelham Parkway on a
25 Saturday?

Barnaba-cross

kp8

1 "A Yes. I had gone there to see if -- I was out,
2 I had no more goods -- to see if he had anything and he
3 said no, he didn't."

4 Were you asked that question and did you give
5 that answer?
6

7 A I recall it.

8 Q Is that answer true today?

9 A Yes.

10 Q Did Pat Dilacio at that time tell you that he
11 had gone to Joseph Di Napoli and Joseph Di Napoli had told
12 you that he had no goods no way?

13 A Yes.

14 Q Of course, you of your own knowledge don't know
15 if Pat Dilacio went to Joseph Di Napoli, do you?

16 A I only know what he told me.

17 MR. LOPEZ: Thank you very much, no questions.

18 THE COURT: Mr. Fisher?

19 CROSS EXAMINATION

20 BY MR. FISHER:

21 Q Mr. Barnaba, I think I am last and of necessity,
22 some of the questions that would serve as predicate for
23 other questions may seem repetitious, but I am assuring
24 you I am trying to establish further points.

25 It is clear, is it not, that you know Torrey

kp9

Barnaba-cross

Shutes quite well?

A I know him.

Q Torrey Shutes is not here in court today?

A I don't see him.

Q You saw him yesterday?

A In court?

Q Yes.

A Yes.

Q You saw him here all day yesterday?

A I saw him part of the morning.

Q Did his presence in court help to remind you of your responsibilities, what you owe to the prosecution in this case?

MR. CURRAN: Objection.

THE COURT: I will permit it. Answer the question.

A No, sir.

Q You do feel a debt, do you not?

MR. CURRAN: Objection as to form, your Honor.

THE COURT: Go ahead and answer it.

Q You feel a debt, do you not, to the prosecution in this case?

A Not really, no.

Q You haven't pleaded guilty in the state court,

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Barnaba-cross

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is that right?

A No.

Q And you are only charged there with an E felony?

A So I was told.

Q Now, it is clear, is it not, you know what an E felony is?

A Yes.

Q In fact, you were told what an E felony is on the night of your arrest by Mr. Rogers and his associates, isn't that right?

A No, it is not.

Q We did go through this yesterday, Mr. Barnaba, so I will just show you what has been marked as Government's Exhibit 3550-A for identification, pages 67 and 68.

A Are you talking about A,B,C,D,E?

Q Yes. You were told what an E felony is?

A Yes.

Q And you knew what an E felony is, right?

A Yes.

Q You also know, do you not, there is nothing to stop Mr. Rogers and his associates from indicting you for an A felony at this time, isn't that right?

A I don't know that.

Q You are aware, however, that that is a distinct

1 kp11

Barnaba-cross

2 possibility?

3 A Now that you are saying it, I guess so.

4 Q And it is a distinct possibility that you might
5 still be charged with a crime for which you could go away
6 for up to life, is that correct?

7 A I don't know, you are telling me.

8 Q You don't know that?

9 A No.

10 Q You haven't even considered that as a possibility
11 is that right?

12 A No.

13 Q As you sit here now, you are aware, are you
14 not, that the judge who will be sentencing you is not a
15 federal judge like Judge Duffy, isn't that right?

16 A I am aware of it?

17 Q Yes.

18 A I imagine it would have to be a state court
19 judge.

20 Q It is a state charge?

21 A Yes.

22 Q And a state court judge will sentence you?

23 A Yes.

24 Q And in the state court, there is such a thing
25 as you are aware as plea bargaining?

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Barnaba-cross

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A Plea bargaining, yes.

Q And you have participated in plea bargaining before, haven't you?

A A few times, yes.

Q So you know about plea bargaining?

A Yes.

Q And you know that in plea bargaining, the recommendation of the District Attorney carries a whole lot of weight, don't you?

A I don't know it, no.

Q You know that if the District Attorney recommends to the Court a walk, the chances stand very, very highly in your favor that is precisely what you are going to get?

MR. CURRAN: Objection.

THE COURT: Sustained.

Q You know, however, that the recommendation of the District Attorney means a great deal in the plea bargaining process, do you not?

MR. CURRAN: Objection.

THE COURT: I think he already answered it.

zpl

Barnaba-cross

4A

Q And in addition thereto, you have a promise that Mr. Phillips will make a statement in your behalf at the time of sentencing, is that right?

A He told me that, yes.

Q Let me ask you this, Mr. Barnaba: as you sit here now, don't you feel that if you were to deviate from the story you have told -- from the latest story you have told to the prosecution, those wonderful things that they would be doing for you might not occur?

MR. CURRAN: Objection to form, your Honor.

THE COURT: Yes, I'll sustain the objection.

Q Withdraw the word "wonderful." Don't you feel at this point --

MR. CURRAN: That wasn't the problem word with me, your Honor.

THE COURT: Let's try it again.

Q As you sit here now, sir, don't you feel that if you were to deviate from your most recent story to the prosecution in your testimony here, their assistance to you at the time of sentence would be not as great as if you were to maintain your most recent story to the prosecution?

MR. CURRAN: I object to the form of that question, your Honor.

1 zp2

Barnaba-cross

2 THE COURT: I will permit it. Go ahead and
3 answer it.

4 A No, I don't think of it, no.

5 Q And if you were now to say that Finnegan was
6 not involved in the transactions you put him into, don't
7 you feel that Mr. Phillips might have something totally
8 different to say to the state court judge at the time of
9 your sentence?

10 MR. CURRAN: I object to the form of that, your
11 Honor. Hypothetical question.

12 THE COURT: I know, but I am going to permit it
13 anyway. Go ahead.

14 A No.

15 Q You said if it meant your freedom, you might
16 be willing to lie a little, right?

17 A I didn't say that, no. You are turning my
18 words.

19 Q In answer to the question, you said, if it meant
20 your freedom, you would be willing to lie a little, your
21 answer was, was it not, "I might"?

22 A I might, yes. I didn't say I would.

23 Q And if you were to lie a little about Finnegan,
24 sir, here and now, would you admit it?

25 A If I lied?

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Q Yes.

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A If I told a lie?

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Q Yes.

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A I wouldn't lie about it.

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Q You testified in response to questions by an attorney put to you yesterday on cross-examination that it never occurred to you that you had to produce cases i : Mr. Rogers in terms of numbers and quantity, is that right?

10

A That's right.

11

Q It never did occur to you, is that right?

12

A That's right.

13

Q The fact is, is it not, Mr. Barnaba, that time and again on the night of your arrest you were told precisely that, right?

15

16

A I don't recall.

17

Q Moments after you began to speak with Mr. Rogers didn't you ask him, "You want, you want an arrest, is that what you want?"

19

20

Didn't you ask him that?

21

A If it's there, I asked him.

22

Q Is it there?

23

A If it's there, I asked him.

24

Q Page 6. 3550-A for identification. The red

25

mark.

1 zp4

Barnaba-cross

2 MR. FISHER: May the record reflect the witness
3 nodded his head in a vertical movement, your Honor.

4 Q And it became clear to you, sir, did it not,
5 that in the world of negotiations with Frank Rogers,
6 nothing gets nothing, isn't that right?

7 MR. CURRAN: Objection, your Honor.

8 THE COURT: I will sustain it.

9 Q You were told, were you not, Mr. Barnaba,
10 "I got to tell you something, man, if you don't know
11 nothing, we can't use you"?

12 A I was told that?

13 Q Yes.

14 A By who?

15 Q By Mr. Rogers. Weren't you?

16 A I don't recall that, but if it's there, I was
17 told it.

18 Q 3550-A for identification --

19 MR. CURRAN: Government's Exhibit --

20 Q Government's Exhibit 3550-A for identification,
21 page 17.

22 A Yes.

23 Q You were told if you were not a big buyer we
24 can't get anywhere with you, weren't you?

25 A I don't recall that either.

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Q Government's Exhibit 3550-A for identification,
page 82.

A Yes.

Q You were told that?

A Yes.

Q You were told in addition that you had to make
a lot of cases, isn't that right?

A I don't recall that either.

Q Didn't Mr. Rogers tell you, sir, I am just
trying to get a figure, how many guys do you think you
could turn us on to?

THE COURT: What page is that, Mr. Fisher?

MR. FISHER: Page 25, your Honor.

Q Do you recall being told that, sir?

A If it's there, I said it.

Q Government's Exhibit 3550-A for identification
page 25.

A Yes.

Q That was told to you too, right?

A Yes.

Q You were told then a few moments later by Mr.
Rogers again, "What I'm trying to figure out is how high
can you go," right?

A Yes.

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Barnaba-cross

Q And you were willing to go, perfectly willing to go as high as you can, weren't you?

A Repeat that?

Q You told Mr. Rogers that night, did you not, "I would go as high as you want me to. I told you, I can get to anybody."

Didn't you tell him that?

A If it's there, I said it.

Q Government's Exhibit 3550-A, if your Honor please, page 31.

A Yes.

Q You said it?

A Yes.

Q You meant it too, didn't you?

A If I said it, I meant it.

Q At that point you weren't confused?

A I don't remember any of that testimony.

Q This wasn't testimony, sir.

A Whatever it was. Interrogation.

Q You told Rogers, didn't you, "What do you want? You tell me anything." Then Mr Rogers cut you off and he said, "No, no, Mr. Barnaba, you tell me." And you said, "What do you want me to do?" And Mr. Rogers said, "Whatever you want to do to help yourself."

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Barnaba-cross

"And you, I will go all the way with you.
You tell me what you want. What do you want me to do?
Tell me what you want me to do.

Rogers telling you, "No, Barnaba, you tell me,"
and then you, "Tell me what you want. If I can get it
for you, I'll get it for you."

And Barnaby, you got it for him, didn't you?

You said those things, Mr. Barnaby, didn't you?

A If they are there, I said them.

Q You were told those things, weren't you?

A If it's there, I was told them.

Q At one point, Mr. Barnaba, the fact is, is it
not, that you agreed to lie in turn for your freedom?

A I haven't lied about anything.

Q That was what you agreed to do, isn't it?

A No, sir.

Q You told Mr. Rogers, didn't you, "I'll work with
you. You feed it to me on one condition, that I get out of
jail."

Isn't that right?

A Yes, sir.

Q Did you need to be fed the truth, Mr. Barnaba?

A No, sir.

MR. CURRAN: Objection, your Honor.

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Barnaba-cross

THE COURT: It is already in.

Q The truth, Mr. Barnaba, is something that you should have known all by yourself, isn't that right?

MR. CURRAN: Objection, your Honor.

THE COURT: I'll sustain it.

Q In effect, Mr. Barnaba, weren't you telling Mr. Rogers, "Give me the script, I'll put on the act"?

MR. CURRAN: Objection, your Honor.

THE COURT: Sustained.

Q Does any of this strike you as humorous, Mr. Barnaba?

A Not really.

Q How long have you known Finnegan?

A Five or six years.

Q Do you know him to be involved in numbers?

A Not that I know of, no.

Q Do you know him from the BeachRose Social Club?

A Yes.

Q Did you ever see him working there as a steward?

A Yes.

Q You would regard Finnegan as someone involved at the Beach Rose Social Club?

A Yes.

Q And in your direct testimony, Mr. Barnaba, you

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Barnaba-cross

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told us about a transaction in August of 1970, is that right?

A Yes.

Q About a transaction in September of 1970, is that right?

A Yes.

Q About three transactions in November of 1970?

A Yes, sir.

Q And 1970, then, was a busy year for you, was it?

A I would say so.

Q The fact is, is it not, Mr. Barnaba, you told people who were questioning you on the night of your arrest that you did nothing in 1970, right?

A Yes.

Q And right after you told him that, you had assured Mr. Rogers that you were leveling with him, "I'm telling you the truth," right?

A Yes.

Q But you weren't telling him the truth, were you?

A No.

Q You were lying?

A I didn't look at it as lying. I already testified. I was holding back.

Q Let's understand that. Your testimony is that

at least you were involved in five transactions in 1970, right?

A Yes.

Q On November 14, 1972, when you spoke with Mr. Rogers and his associates, you said you did nothing in terms of narcotics in 1970, isn't that right?

A Yes.

Q Now, you are telling us that was not a lie, is that right?

MR. CURRAN: I object, your Honor. This has been gone over at least three times.

MR. FISHER: I will withdraw it, your Honor.

Q Mr. Barnaba, you were holding back at that point, is that right?

A Yes.

MR. CURRAN: Objection, your Honor.

MR. FISHER: This is a prefatory question, your Honor.

THE COURT: I will permit it.

Q Holding back to minimize your own involvement in narcotics, is that right?

A Yes, sir.

Q I believe you told us yesterday that you already involved yourself enough?

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Barnaba-cross

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A Yes.

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A I don't recall that.

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A Yes.

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A Yes.

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Q In 1972?

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A Yes.

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Q Mr. Barnaba, isn't it a fact that moments before
instants before you denied involvement in narcotics trans-
actions in 1970, you calmly advised Mr. Rogers of your
feeling in 1972 in 8 kilograms of narcotics and maybe more?

Q Referring to Government's Exhibit 3550-A for
identification, page 84, read the top of the page, right
through the bottom, Mr. Barnaba, and tell us whether or
not that refreshes your recollection.

Have you read that, Mr. Barnaba?

Q Does that refresh your recollection as to wheth-
or not moments before you denied involvement in narcotics
in 1970, you admitted to 8 kilos and maybe more pounds
of narcotics transactions?

Q And a kilo, you understood was 2.2 pounds,
3 is that right?

A Yes.

Q So we are talking about 20 pounds of narcotics
in 1972?

A Right.

Q You knew for each one of those you could go away
for life, right?

A I didn't think of it at that time.

Q Now much more could you be involved, Mr.
Barnaba?

MR. CURRAN: Objection, your Honor.

THE COURT: Sustained.

Q How long do you think you are going to live,
Mr. Barnaba?

MR. CURRAN: Objection, your Honor.

THE COURT: Sustained.

Q How many lifetimes in jails do you think you
can forfeit, Mr. Barnaba?

MR. CURRAN: Objection, your Honor.

THE COURT: Sustained.

Q The fact is, Mr. Barnaba, you were not trying
to minimize your involvement, Mr. Barnaba, you were tell-
ing them the truth, is it not?

2 A It wasn't the truth, no.

3 MR. FISHER: Your Honor, would this be an
4 appropriate time?

5 THE COURT: Yes.

6 Ladies and gentlemen of the jury, I am going
7 to request the marshal to take you to lunch right now.
8 Everybody else remain seated, please.

9 (The jury left the courtroom.)

10 THE COURT: Mr. Fisher, how much longer do
11 you expect to be?

12 MR. FISHER: About 20 minutes.

13 THE COURT: I should have finished that off
14 by just delaying lunchtime.

15 All right. Go ahead, Mr. Curran.

16 MR. CURRAN: Your Honor, my application is
17 to inform the court and ask the court's permission to
18 speak to the witness Barnaba during the luncheon recess
19 for the sole purpose of preparing him, asking him ques-
20 tions in connection with redirect examination, which
21 I anticipate will begin after Mr. Fisher finishes his
22 cross. I have not, of course, communicated with the
23 witness about the case at all since his direct examination
24 concluded on Friday afternoon at about 4 o'clock or
25 thereabouts, and in order to expedite the time of the court

and the jurh this afternoon I would make that request.

MR. FISHER: If your Honor please, on advice of my client, I would object to that and ask instead for a five-minute recess. I am sure Mr. Curran doesn't have a great deal to discuss with the witness.

THE COURT: I wouldn't bet on that. No, I don't think that can be handled in a five-minute recess.

MR. CURRAN: Your Honor, may I make another suggestion? How about if your Honor were to bring the jury back now and conclude cross and then the problem would become academic.

MR. FISHER: I would be willing to do that.

THE COURT: All right. That's what we will do.

MR. ELLIS: Your Honor, it is not academic at all. The principle there is going to be if he can talk to the witness.

THE COURT: I'll permit him to.

MRS. ROSNER: For the record, I object to Mr. Curran or anyone else connected with the government being permitted to speak with the witness while he is undergoing examination.

THE COURT: All right. All right, we are

going to go ahead now.

MR. FISHER: If your Honor please, in view of the court's ruling with regard to allowing the U. S. attorney to prepare the witness for redirect, I have no other objection than the one pronounced Mrs. Rosner and we can go to lunch.

THE COURT: Don't worry. I will give you a lunch break.

(Jury present.)

THE COURT: I am sorry to disappoint you but we are going to have to delay lunch a little bit today. It looks like Mr. Fisher may be able to end within a relatively short time and under the circumstances we felt it would be better to go straight through.

All right, Mr. Fisher.

BY MR. FISHER:

Q Mr. Barnaba, on direct examination you told us, I think in your words, on a few occasions, I think, Finnegan was there. Do you recall that?

A Yes, I do.

Q And you thought Finnegan was there in the Beach Rose Social Club at a time you claim you were discussing narcotics deals, is that right?

A I don't recall that, no.

Q Was Finnegan, so far as you recall, present in

the Beach Rose Social Club when you were discussing narcotics ventures?

A Yes.

Q You were, according to your testimony?

A Yes.

Q Was he present close enough to you so as to be able to listen in and participate in the conversations, ever?

A Not that I recall, no.

Q Never, right?

A No.

Q But on direct testimony you told us that you think Finnegan was there, is that right?

A He was in the vicinity.

Q You didn't tell us, though, that he was there but couldn't hear what you were saying, right?

A No.

Q You told us in direct examination that you happened to meet Mr. Inglese in 1970, he stopped at a light, is that right?

A Yes.

Q And you told us as well that he told you, if you wanted to deal in narcotics, you should see him or Finnegan or Joe Crow, is that right?

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A Yes.

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Q You never mentioned the part about he should see Finnegan -- you should see Finnegan or Joe Crow on the night of your arrest, did you?

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A No.

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Q Then when you were questioned by Agent Torrey Shutes, debriefed, for four days in September you didn't tell him that either, did you?

10

A No, that I recall.

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Q Then when you carefully set out in your own handwritten notes your false story you didn't mention that then either, did you?

14

A No, sir.

15

16

17

Q And later, a two-day debriefing again with Agent Torrey Shutes, you didn't mention it there either, did you?

18

A No, sir.

19

20

Q This, then, was an afterthought, was it not?

A That's what I remembered later, yes.

21

22

Q Are you receiving lately any medication to improve your memory, sir?

23

A No.

24

Q It just happened naturally, is that right?

25

A Yes.

2 Q The fact is, is it not, Mr. Barnaba, that on
3 the night of your arrest when you were asked who was in-
4 volved in narcotics at the Beach Rose Social Club you
5 didn't mention Finnegan?

6 A No, I did not.

7 Q You mentioned others and you were asked
8 is that all, and you said yes, and you never mentioned
9 Finnegan on that night, right?

10 A I don't remember mentioning his name, no.

11 Q Were you confused, sir?

12 A I already stated that.

13 Q You were confused at that point in time too
14 then, is that right?

15 A All the time I was there.

16 Q All the time you were there?

17 A Yes.

18 Q You were in a room with people you didn't
19 know too well, is that right?

20 A Yes.

21 Q They were firing questions at you, is that
22 right?

23 A Yes.

24 Q You weren't prepared to answer?

25 A Prepared?

2 Q Yes, prepared. Is that right?

3 A Like I said, I was confused.

4 Q At one point isn't it true, Mr. Barnaba, you
5 asked for more time to answer?

6 A I don't recall that.

7 Q Didn't Mr. Rogers tell you, "You tell me what y
8 are going to get me into," and didn't you say, "I can't
9 tell you offhand. I got to have time"?

10 A Yes.

11 Q You needed time to prepare your story, isn't
12 that right?

13 MR. CURRAN: Objection, your Honor.

14 THE COURT: I'll sustain that.

15 Q You weren't ready at that time to give the
16 whole script, is that right?

17 MR. CURRAN: I object to the form of that,
18 your Honor.

19 MR. FISHER: Withdrawn.

20 Q In any event, you wanted them to feed it to you,
21 isn't that right?

22 A No, I wouldn't say that.

23 Q You said you were confused because there were
24 people in the room you didn't know, you were being thrown
25 questions and of course you were scared, right?

1 lza

Barnaba-cross

1800

2 A Yes.

3 Q Worried about whether or not you would wind up
4 in jail for a spell, right?

5 A Yes.

6 Q And you weren't prepared for the experience
7 that you were then having, is that right?

8 A I don't understand the word "prepared."

9 Q Well, this wasn't something that you had ever
10 done before, is it?

11 A --- I had been in jail before.

12 Q You were never with Mr. Rogers being grilled
13 before, were you?

14 A --- No.

15 Q This was a first?

16 A Yes.

17 Q And your testimony here is a first too, isn't
18 it?

19 A Yes.

20 Q People you don't know right around you,
21 right?

22 MR. CURRAN: I object to that question.
23 Can I have a ruling on the question?

24 THE COURT: Yes. I'm not terribly sure I
25 understand the question.

Q There are poeple here throwing questions at you, is that right?

A Yes.

Q But this time you no longer are worried about going to jail, are you?

MR. CURRAN: Objection, your Honor. It's argumentative.

Q This time, Mr. Barnaba --

THE COURT: It is argumentative. I think Mr. Fisher should recognize that.

Q This time, Mr. Barnaba, you are prepared, is that right?

MR. CURRAN: Objection, your Honor.

THE COURT: No, I'll permit that.

Q You are prepared for this testimony, MR. Barnaba, aren't you?

A Like I say, I got together, I put the notes together.

Q You have been together with Mr. Phillips and Mr. Curran a great deal -- a great many hours?

A I testified to that already.

Q Right. And you have also told us that you have gone through every question and answer in your direct testimony previously with either Mr. Curran or Mr.

Phillips or both?

MR. CURRAN: Objection.

THE COURT: That's not his testimony.

Q Was any question put to you by Mr. Curran that he hadn't put to you in the three or four weeks you were seeing him?

A I didn't understand.

Q Did any question that Mr. Curran put to you on direct examination take you by surprise?

A Some of it, yes.

Q Some of them did?

A Yes.

Q Do you recall which?

A No.

Q You did testify in response to a question put to you by one of the lawyers on cross examination that during your conversations with Mr. Phillips and Mr. Curran each of them were making notes, is that right?

A No. That was not my testimony. You mean at one time?

Q Yes.

A I never --

Q You met with Mr. Phillips and he was making notes during his interview of you, is that right?

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A Yes.

3

4

Q You met with Mr. Curran and he was making notes
is that right?

5

A Yes.

6

7

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Q And at the times you met with each of them
separately you were discussing what ultimately became your
testimony herein, is that right?

9

A More or less.

10

11

MR. FISHER: Your Honor, I call for the
production of those notes.

12

13

MR. CURRAN: Your Honor, I object to that
statement in front of the jury.

14

15

THE COURT: Absolutely. Besides that, they
will not be turned over and you know it.

16

17

MR. FISHER: I submit we are entitled to it
under Title 18, United States Code, Section --

18

19

THE COURT: No, you are not. It is well
known you are not.

20

21

MR. FISHER: I submit respectfully it is
well known to the contrary.

22

23

THE COURT: That may be but in this court
you are not going to get them.

24

25

I am surprised at you even bringing this
matter up in front of the jury.

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Barnaba-cross

1804

2 Ladies and gentlemen, I told you that matters
3 of law are none of your province whatsoever and please
4 ignore this entire transaction.

5 All right.

6 Q You told Mr. Rosenberg, did you not, that
7 Lieutenant Whalen promised you a plane ticket?

8 A A what?

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Barnaba-cross

1805

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Q You told Mr. Rosenberg Friday that Lieutenant Whalen had promised you a plane ticket, is that right?

3

4

A No.

5

6

MR. FISHER: May I have Friday's testimony, please.

7

8

Q Were you told by Lieutenant Whalen that after you testified you would be permitted to leave the state to get a new identity, that you would be set up?

9

10

11

A No, I don't recall that. What he said was that I would be free.

12

13

14

Q That was your testimony. Your response was, "Well, Lieutenant Whalen mentioned something like that one time."

15

Right?

16

A Yes.

17

Q That was the truth, isn't it?

18

A Yes.

19

Q But you didn't believe that, right?

20

A No, sir.

21

Q Didn't you trust Lieutenant Whalen?

22

A It's not that I didn't trust him. Like I testified before --

23

24

Q Excuse me --

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MR. CURRAN: Your Honor, may the witness

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answer the question?

THE COURT: Yes.

A I have been in courts before. There is only one man that can tell me I am free or going to jail and that is the judge.

Q Who set the bail in your case, a judge?

A I imagine so, yes.

Q How much did he set it for?

A A thousand cash or \$5000 bond.

Q Just what Mr. Rogers wanted, right?

A That I don't know.

MR. CURRAN: Objection, your Honor.

THE COURT: The witness has already answered he doesn't know.

Q You are not worried about a judge, are you, sir, you are worried about Mr. Rogers and Mr. Curran and Mr. Phillips, right?

A They are not judges, counselor.

Q You told us yesterday that on the night of your arrest, in response to questions put to you by Mrs. Rosner, that you had no idea what kind of a case the state authorities had against you, is that right?

A I know what he said.

Q But he didn't tell you when you were supposed

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rka Barnaba-cross 1807

to have made a sale, with whom, he didn't play any tapes
for you, he didn't show you the person he dealt with, right

A It's in the transcript there, counselor.
He had me on an A felony, 50 years to life.

Q And that is all he told you, right?

A Yes.

Q In that regard, no details, right, is that
correct?

A I am going by the transcript. I don't
recall what really went on that night.

Q And now you are telling us, sir, that you had
no deal with the state prosecutors, is that right?

MR. CURRAN: Objection, your Honor. That
is argumentative. The witness has testified.

THE COURT: I know.

Answer the question.

Q On the night of your arrest, you are telling
us that so far as you were concerned, you had no deal
with the state prosecutors?

A No deal.

Q So without a deal, without having the slightest
real idea of what kind of a case they had against you, you
are telling us, Mr. Barnaba, that you proceeded to confess
your life away, is that right?

MR. CURRAN: Objection.

THE COURT: Sustained.

Q How many times, Mr. Barnaba, after November 14, 1973, did you go out wired?

MR. CURRAN: Objection.

Q 1972.

MR. FISHER: Thank you, Mr. Curran.

A I don't recall.

Q More than 10?

A I have no idea.

MR. FISHER: Has this been marked as 3500-something?

MR. CURRAN: It's a court's exhibit.

Q Showing you Court's Exhibit 55 for identification, I ask you to review that list and ask whether or not that refreshes your recollection to be the approximate number of times you went out wired?

A This is supposed to be when I was wired.

THE COURT: Just take a look at the list.

(Pause.)

Q About 20 times, sir?

A I didn't count them. I was looking at them.

Q Would that be a fair approximation?

A I would say so.

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Barnaba-cross

1809

Q I believe you told us, Mr. Barnaba, that at one point in your life you trained guard dogs, is that right?

A Yes, sir.

Q What kind of dogs?

A Not myself. I had trainers.

Q You didn't participate yourself?

A Not to the whole extent, no.

Q To any extent, sir?

A Yes.

Q Were those guard dogs trained by you and your associates to attack people?

A They were guard dogs, yes.

Q To kill people?

A I don't know of them killing any people.

Q Did you use models of humans in the course of your training program?

A What was that?

Q Did you use models of human beings?

A No.

Q Were they trained, these dogs, to attack any particular ethnic group?

A No.

Q You told us that you never discussed any

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Barnaba-cross

1810

2 other, if any there be, illegal activities on your part
3 with anyone in the federal government save for your narcotics
4 trafficking, is that right?

5 A Illegal activities?

6 Q Yes.

7 A Not that I recall, yes.

8 Q Did you ever discuss your possible involve-
9 ment in counterfeiting?

10 A No.

11 Q Did you ever discuss your possible involvement
12 in loansharking?

13 A No, not that I recall.

14 Q Never mentioned it to anyone in law enforcement?

15 A In law enforcement?

16 Q Yes.

17 A I don't recall. I may have.

18 Q Did anyone in law enforcement ever mention it
19 to you?

20 A I don't recall.

21 MR. CURRAN: I object, your Honor.

22 THE COURT: He said he didn't recall.

23 Q The fact is, is it not, Mr. Barnaba, that you
24 were involved in loansharking?

25 MR. CURRAN: Objection, your Honor.

THE COURT: Sustained.

5B

MR. FISHER: May I make an offer of proof at the side bar?

THE COURT: No. I think we went through this once before with Mr. Dowd.

MR. FISHER: I don't know what theory he proposed.

THE COURT: All right, come up.

(At the side bar.)

MR. FISHER: I assume your Honor has seen the intercept?

THE COURT: Yes.

MR. FISHER: The offer is this: in view of the fact he was intercepted and he knows he was intercepted, he knows that they know about loan sharking and "they" being the police. Therefore, it bears on the matter of motive of his testimony. He knows they know about that too and he may be testifying to that as well. Not only the narcotics transactions, but you know loan sharking is now a federal crime under the extortionate extension of credit, the constitutionality of which we argued in the Supreme Court, so it is definitely a federal law, your Honor.

MR. CURPAN: Your Honor, first I don't know that the witness knows he was intercepted, so I suspect

1 kp2 Barnaba-cross

2 that perhaps, and I stress "perhaps" Mr. Fisher's major
3 premise is defective.

4 If it is, then I think the rest of his point
5 probably falls.

6 MR. FISHER: I will try to establish that,
7 assuming that is a predicate, so we can save another trip
8 back here.

9 MR. DOWD: If I may, yesterday, Mr. Barnaba
10 testified that he had also been told by Mr. Rogers that
11 his phone was tapped.

12 MR. FISHER: That is right.

13 MR. CURPAN: The point, I think, there has
14 to be some showing that he knew or knows he was under
15 investigation for a particular crime and in this particular
16 case, it is loan sharking, before he can get into another-
17 wise entirely collateral area.

18 MR. FISHER: I don't think he has to know he
19 was under investigation. I think all he has to know is
20 that they know about it and that could be another reason
21 not only for the state cooperation but the federal coopera-
22 tion as well. The federal law is a maximum of 20 years
23 in prison.

24 MR. CURRAN: There has been no foundation for
25 that.

1 kp3

Barnaba-cross

2 MR. FISHER: You are not letting me make the
3 foundation, I would like to.

4 MR. CURRAN: There were questions asked about
5 the federal government already.

6 THE COURT: And he talked to no one from either
7 state or federal government about this.

8 MR. CURRAN: Yes.

9 MR. FISHER: He already said that Mr. Phillips
10 told him he wouldn't be prosecuted for anything else.
11 I think that was his testimony earlier today.

12 THE COURT: Anything in connection with this case
13 in narcotics. That is all he talked about.

14 MR. CURRAN: He testified to that on Friday.

15 MR. FISHER: Maybe it is because of his own
16 awareness of his involvement in loan sharking.

17 It should be allowed to be inquired into.

18 MR. CURRAN: And I think it has been with this
19 witness about as broadly as one could imagine.

20 MR. FISHER: That is all we have.

21 THE COURT: I don't think I am going to let it
22 in.

23 (In open court.)

24 BY MR. FISHER:

25 Q Mr. Barnaba, you told us you weren't being

kp4

Barnaba-cross

candid in the past, but now in effect you have seen the light and are telling the whole truth, is that right?

A Yes.

Q You testified, by the way, Mr. Barnaba, with respect to some of the events in your story in the New York County Grand Jury, isn't that right?

A Yes.

Q And that was on or about May 29, 1973, is that right?

A It was in May, yes.

Q Prior to that testimony, you swore to tell the truth, the whole truth and nothing but the truth, right?

A Yes.

Q The same oath you took here, right?

A Yes.

Q When you went into that grand jury, you found a lot of grand jurors that you were testifying to, right?

A People, yes.

Q People like this jury here?

A They were people.

Q And you were asked about transactions with Cigi and Finnegan, is that right?

A Probably, yes.

Q With respect to Finnegan, you told them one,

1 kp5 Barnaba-cross

2 right?

3 A Yes.

4 Q One, right?

5 Now you are telling us the truth at last, Mr.

6 Barnaba?

7 A Yes.

8 Q Not the truth when you were arrested, right?

9 A Yes.

10 Q Not the truth in May under oath, right?

11 MR. CURRAN: I object to that, your Honor.

12 THE COURT: Sustained.

13 Q Were you telling the truth before the grand jury
14 with regard to Finnegan?

15 A As to what I said?

16 Q Yes.

17 A Yes.

18 Q You were, only one transaction?

19 A I testified before, I was holding back.

20 Q Then it wasn't the truth, was it?

21 A I didn't look at it as a lie.

22 Q Mr. Barnaba, a year from now, are you going to
23 tell someone else that you didn't look on your testimony
24 here as a lie?

25 MR. CURRAN: I object to that.

kp6

Barnaba-cross

THE COURT: Sustained.

Q The fact is, Mr. Barnaba, is it not, truth is trading your rightfully deserved place in jail with him, right?

MR. CURRAN: Objection.

THE COURT: Sustained.

Q Truth, Mr. Barnaba, is in the eye of the beholder, is that right?

MR. CURRAN: Objection.

THE COURT: Sustained.

MR. FISHER: No further questions.

THE COURT: Does any other defense counsel wish to inquire?

All right, ladies and gentlemen, now you will go to lunch.

(Jury leaves courtroom.)

THE COURT: It is about ten minutes of one. I hope you don't have any great difficulties eating it being a court holiday. How about 2.15 to come back here.

(Luncheon recess.)

- - -

AFTERNOON SESSION(2:25 p.m.)

(In the robing room.)

MRS. ROSNER: Judge, we are in the process of taking the handwriting exemplars. Thus far Mr. Inglese has completed to the extent of printing first in pencil, then in ink, a random sentence containing the names Salvatore Larca and Frank Stasi, the sentence being "Salvatore Larca does not know Frank Stasi."

I emphasize that the condition of the sentence was chosen at random for the sole purpose of incorporating both names into one sentence.

Now we come to step 2.

THE COURT: Who is Salvatore Larca?

MR. PHILLIPS: He is a defendant in another case.

MRS. ROSNER: The government has prepared a number of papers approximately three inches by an inch and three-quarters, rectangular, with a half moon cut out at the top. These papers purport to be replicas of a handwriting sample in the government's possession.

The government would like Mr. Inglese to execute the name Frank Stasi..

MR. ENGEL: Jusg to make it clear as to what we want on this piece of paper, we want the following:

Just underneath the half moon we want the numeral "1" circled in pencil. Under that we want the name Salvatore Larca, also in pencil. Under that we want the name Frank Stassi in ink.

MR. PHILLIPS: Spelled with two s's.

MRS. ROSNER: We oppose that for this reason: Mr. Inglese has no objection to giving exemplars how he would write Salvatore Larca and Frank Stassi, but what the government has done is to stage and direct him in a testimonial fashion, to make an arrangement on this card which Mr. Inglese would not necessarily make undirected.

In other words, they have told him to position the one in a certain place and position the names in a certain place, which gives a testimonial content.

It calls for the operation of Mr. Inglese's mind or imposes on his mind a certain operation which is testimonial in nature. Their point is to compare the handwriting and that he is perfectly willing to give them, but they are creating evidence which does not necessarily come from him by requiring the arrangement of words which they have on some other exemplar, and that is what we object to. That is putting the

words in his mouth.

MR. ENGEL: The government's position with respect to that, with respect to the positioning, we are just asking for vertical positioning, if you will, and that the positioning that the defendant puts on the card vis-a-vis the names and the number is his own doing, and the extent those are similar with the model that we have, that perhaps helps the government's case; but if they are not similar it helps Mr. Inglese.

To our view it is not prejudicial.

THE COURT: I heard you both.

MRS. ROSNER: May I make one more point?

THE COURT: Yes.

MRS. ROSNER: If he writes the l over to the left or tries to invert the name, the defendant's consciousness of guess, if he does it their way, they will tell the jury, "Look, he did it the same way."

THE COURT: I assume you are going to use some kind of expert?

MR. PHILLIPS: Yes.

THE COURT: Get it all done on big cards.

MRS. ROSNER: Thank you. The record should show the government's handwriting expert is here, Mr. Caputo. He is watching the exemplars being

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2 taken.

3 MR. PHILLIPS: Your Honor, this is most
4 commonly done in bank robbery cases where the government
5 has a specific note given to a teller demanding that
6 money be turned over. The very words contained in that
7 note, the government has an absolute right to have the
8 defendant write or print.

9 THE COURT: All I am saying is they can
10 write on big pieces of paper, the 1 and the names,
11 Salvatore Larca and Frank Stassi.

12 THE COURT: Mr. Siegal, you have a problem?

13 MR. SIEGAL: Yes.

14 I will tell you what, last evening a former
15 client of mine called my attention to the possibility
16 that one of the jurors on this jury, and I feel the same
17 way, might be a friend of a severed defendant.

18 Now, I would feel much better, because I have
19 been practicing law about two or three years by now, and
20 he also indicated --

21 THE COURT: That is what you said to me 20 years
22 ago.

23 MR. SIEGAL: He also said to me that he
24 didn't know the name, but a thin, Italian juror.

25 I would feel much better if you would question

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1821

2 this man, and ask him if he knows the Loria family.

3 MR. PHILLIPS: Who do you propose to
4 question, all the thin Italians on the jury?

5 THE COURT: Let me take a look at them this
6 afternoon.

7 MR. CURRAN: It is Anthony Loria, I believe.

8 MR. SIEGAL: That was the severed defend-
9 ant.

10 THE COURT: That is not the juror's name, I
11 assume.

12 MR. SIEGAL: Of course not.

13 If you get to him and question him and he
14 knows this fellow and how closely he knows him, or maybe
15 he doesn't, maybe sparsely, and maybe I am in an abundance
16 of caution talking off the top of my head, but, after
17 all, I am talking about a severed defendant, not about
18 Tramunti, but I would still feel better if you question
19 him.

20 THE COURT: Okay.

21 With regard to something else, I would like to
22 go off the record.

23 (Discussion off the record.)

24 (In open court; jury present.)

25 THE COURT: You may proceed.

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1822

2 J O H N B A R N A B A resumed.

3 REDIRECT EXAMINATION

4 BY MR. CURRAN:

5 Q Mr. Barnaba, you are reminded you are still
6 under oath, do you understand that?

7 A Yes.

8 Q Did you talk to me in my office during the
9 luncheon recess?

10 A Yes, I did.

11 Q Did I ask you questions?

12 A Yes.

13 Q Mr. Barnaba, on cross examination yesterday
14 morning by Mr. Rosenberg, the defendant Pugliese's lawyer,
15 you testified that you met the defendant Pugliese in
16 front of Beach Rose Social Club in July or August of 1970.

17 Was that a correct statement?

18 A No.

19 Q What is the correct date?

20 A '71.

21 Q You misspoke by a year?

22 A Yes.

23 Q You also testified, Mr. Barnaba in response to
24 a question on cross examination by Mr. Rosenberg that you
25 talked to the defendant Pugliese in March or April of

1973; do you recall that?

A Yes.

Q Where did you talk to the defendant Pugliese in March or April of 1973?

A Izzy's Luncheonette, Buhre Avenue and Westchester Avenue in the Bronx.

Q Will you tell us as best you recall what you said and what Pugliese said on that occasion?

MR. ROSENBERG: Objection. It is not proper redirect.

THE COURT: I will permit it.

Q You may answer, Mr. Barnaba.

A I met him there. We said, "Hello. How are you?" general formalities. He asked me, "What happened Patty and Harry?"

I said, "I went around a few times to see Harry. Every time I went there he said he didn't have anything, so I didn't bother to go around any more."

He said, "Patty can use coke if you can get it."

I said, "Give him my number and have him call me," but he never called me.

Q Is that the extent of the conversation, as you recall it?

A Yes.

1B 1 kpl Barnaba-redirect 1824
2 Q You also testified on cross-examination in
3 response to a question by Mr. Rosenberg, that you gave no
4 money to the defendant Pugliese; do you recall that testi-
5 mony?

6 A Yes.

7 Q In the year 1971, did the defendant Pugliese
8 introduce you to Patty and Harry?

9 A Yes.

10 Q And to Hank, the defendant Springer?

11 A Yes.

12 Q Did he ever tell you --

13 MR. ROSENBERG: If your Honor please, I will
14 object to the leading.

15 MR. CURRAN: I haven't completed the question.

16 MR. ROSENBERG: It is leading at this point.

17 MR. CURRAN: It doesn't suggest an answer.

18 THE COURT: Let's hear the question.

19 Q did the defendant Pugliese ever tell you why
20 he introduced you to Patty and Harry and to Hank?

21 MR. ROSENBERG: Objection.

22 THE COURT: It is overruled.

23 Q Is the answer to that question "Yes"?

24 A Yes.

25 Q what did he tell you?

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Barnaba-redirect

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2 A He was going to jailand that I should take care
3 of him.

4 Q Take care of whom?

5 A The customers that he was leaving me.

6 Q This occurred in 1971?

7 A Yes.

8 Q You were questioned, Mr. Barnaba, I think rather
9 extensively during your cross-examination about portions
10 of your debriefing by Mr. Rogers on November 14, 1972;
11 do you recall that?

12 A Yes, I do.

13 Q About how long approximately did your session
14 on that evening with Mr. Rogers last?

15 MR. ELLIS: Objection. Asked and answered
16 several times.

17 THE COURT: I think it has been.

18 MR. CURRAN: May I ask the next question?

19 THE COURT: Yes.

20 Q Mr. Barnaba --

21 MR. CURRAN: Page 85 of Government's Exhibit
22 3550-A.

23 Q Were you told during the course of that debrief-
24 ing session:

25 "The only way you are worth anything to us" --

kp3

Barnaba-redirect

MR. SIEGEL: Your Honor --

Q -- "so we know you are telling the truth. You can't expect" -- you interrupt and say "I" -- "You can't expect somebody to take a chance on you when you don't tell us what you know is true."

Was that said to you in that session?

MR. ELLIS: Objection.

THE COURT: I will permit it.

A Yes.

Q Mr. Barnaba, Mr. Rogers, Frank Rogers, is a New York State prosecutor, is that correct?

A Yes.

Q Prosecuting narcotics cases in New York City?

A Yes.

Q There came a time on November 14, 1972, when you agreed to cooperate with his office, is that right?

A Yes, sir.

Q Did you reach an understanding with Mr. Rogers as to what your cooperation was to entail?

A Yes.

Q What was that understanding?

MRS. ROSNER: Objection, your Honor.

THE COURT: I will permit it. Go ahead.

A That I was to go on the street and try to buy

1 kp4 Barnaba-redirect

2 narcotics from people that I knew that were in the narcoti
3 business.

4 Q Did you do that?

5 A Yes.

6 Q Did you introduce an undercover police officer
7 to these people?

8 A Yes, I did.

9 MRS. ROSNER: Objection to the form of the
10 question. Move to strike the answer.

11 MR. FISHER: Particularly, if your Honor please
12 "these people."

13 MRS. ROSNER: That is my objection.

14 THE COURT: Reform the question.

15 Ladies and gentlemen, when there is a motion to
16 strike and I suggest the question be rephrased, forget about
17 the question and the answer.

18 Go ahead.

19 Q Beginning in November of 1972 and continuing
20 until about September of 1973, did you in fact cooperate
21 with Mr. Rogers as you just testified?

22 MRS. ROSNER: Objection. Conclusory.

23 THE COURT: It is leading, but go ahead and
24 answer the question.

25 A I did.

kp5

Barnaba-redirect

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2 Q In the course of that cooperation, did you
3 introduce an undercover police officer to anyone?

4 A I did.

5 Q To approximately how many people?

6 MR. ELLIS: Objection. A number is irrelevant.

7 THE COURT: I will sustain it.

8 Q What was the name of that undercover police
9 officer?

10 A Alfred Cassella.

11 Q C-a-s-s-e-l-l-a?

12 A Yes, sir.

13 Q To your knowledge, did Officer Cassella make
14 purchases of drugs from people to whom you introduced him?

15 MR. ELLIS: Objection.

16 THE COURT: I will sustain it.

17 Q Did you ever introduce Al Cassella, the under-
18 cover police officer, to someone whom you knew was not
19 involved in narcotics?

20 MRS. ROSNER: Objection. Specifically, your
21 Honor, it calls for the operation of a witness's mind.

22 MR. CURRAN: May I be heard on that, your
23 Honor?

24 THE COURT: No. I will permit it.

25 Q You may answer.

kp6

Barnaba-redirect

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A No.

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Q As a result of your cooperation with Mr. Rogers office over this approximately 10 or 11-month period, were a number of arrests made?

6

A Yes.

7

MRS. ROSNER: Objection.

8

THE COURT: Sustained.

9

A Yes.

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THE COURT: It is sustained.

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Ladies and gentlemen, just forget about the question and the answer.

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Q When for the first time, Mr. Barnaba, did you speak with anybody connected with the federal government about this case now on trial?

16

A October..

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Q Of what year?

18

A 1973.

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Q Was that the first time you spoke to anybody representing the federal government in any connection?

21

A Yes, sir.

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Q In the course of your cooperation with Mr. Rogers office after November 14, 1972, and continuing up through September of 1973, did Mr. Rogers ask you about past transactions that you had in narcotics?

1 kp7 Barnaba-redirect

2 MRS. ROSNER: Objection, your Honor, asked and
3 answered.

4 THE COURT: I will permit it.

5 A No, sir.

6 Q Who was the first representative of the federal
7 government whom you met in September or October of 1973?

8 A Mr. Phillips.

9 Q Is that Mr. Walter Phillips, seated at counsel
10 table there?

11 A Yes, it is.

12 Q The first time you met Mr. Phillips in 1973,
13 where did you meet him?

14 A Fort Schuyler, in the Bronx.

15 Q Did you talk with him on that occasion?

16 A Yes, I did.

17 Q On that occasion, did you tell Mr. Phillips
18 everything you have testified to in this courtroom?

19 MRS. ROSNER: Objection. Self-serving, if you
20 please.

21 THE COURT: I will permit it.

22 Did you tell Mr. Phillips everything you testi-
23 fied to?

24 A No.

25 Q Why not?

1 kp8

Barnaba-redirect

2 MRS. ROSNER: Objection.

3 THE COURT: I will see counsel at the side bar.

4 (At the side bar.)

5 MR. CURRAN: Your Honor, the defense through
6 some two days of cross-examination have hammered extensively
7 at the fact that certain things were not told Mr. Rogers,
8 certain things were not told Mr. Phillips, certain things
9 were not told Mr. Shutes, certain things were not said in
10 the grand jury. It seemed to me I am entitled to explain
11 through this witness, and the law is clear, through this
12 witness's testimony, the circumstances on which he made
13 these statements and the reasons, his motivations that he
14 talked to Mr. Phillips first and how the situation evolved,
15 so the jury has full picture of this defendant's position
16 in this case, and they raised it and I think the door is
17 wide open to this question.

18 THE COURT: I am not saying the door is not wide
19 open. I am worried about what the answers are going to
20 be.

21 MR. CURRAN: I can represent what I understand
22 the answers are going to be.

23 The answer is going, as I understand it, that
24 he did not tell Mr. Phillips the whole story at that time
25 because he held back and he held back from Mr. Phillips

1 kp9 Barnaba-redirect

2 because he had cooperated fully with Mr. Rogers, in
3 his judgment at least in terms of what he told Mr. Rogers
4 he would do, and he felt he had done enough by way of
5 cooperation with Rogers or anybody else.

6 MRS. ROSNER: I have no objection to that
7 answer, as a matter of fact.

8 MR. ELLIS: I have no objection.

9 MRS. ROSNER: I withdraw the objection.
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Barnaba-redirect

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BY MR. CURRAN:

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Q Mr. Barnaba, I think I asked you whether you had told Mr. Phillips on this first occasion that you met him all the facts about this case to which you have testified, and your answer was no. Do you recall that?

A Yes.

Q My next question to you was why not, and you now may answer that question.

A I was working for Mr. Rogers almost a year up to then, and I felt I had been involved enough, I had done enough.

MR. SIEGAL: May we have that answer again?
He dropped his voice.

THE COURT: Mr. Reporter, would you read back that answer?

(Last answer was read.)

Q After you talked with Mr. Phillips on that occasion, did Mr. Phillips talk to you?

A Yes.

Q What did he tell you?

MRS. ROSNER: Objection, hearsay.

MR. ELLIS: Objection.

THE COURT: I will sustain the objection.

Q Mr. Barnaba, you have been questioned on cross-

mbp2

Barnaba-redirect

examination rather extensively about certain grand jury testimony in the federal court here. Do you recall that questioning?

A Yes.

Q And your answers?

A Yes.

Q Mr. Phillips questioned you in the grand jury both in October and in December, didn't he?

A Yes.

Q Did you do anything more in those grand jury sessions than just answer questions put to you by Mr. Phillips?

A No, sir.

MRS. ROSNER: Objection, argumentative, your Honor.

THE COURT: No, I will permit it.

Q And did you answer truthfully --

MR. ELLIS: Objection.

THE COURT: Do you want to know what the question is?

Q -- all the questions put to you on those two occasions at the grand jury?

MR. ELLIS: Objection.

THE COURT: All right, I will permit it. Did

mbp3

Barnaba-redirect

you answer truthfully all the questions put to you by Mr. Phillips in the grand jury?

THE WITNESS: To the best of my knowledge, yes.

Q Mr. Barnaba, directing your attention to the cross-examination by Mr. Richman, who represents the defendant Tolopka, do you recall testifying that on cross-examination you were first introduced to the defendant Tolopka back in about the summer of 1967 by a man named Fred Lalli?

A Yes.

Q Where did that introduction take place?

A Up-State New York.

Q At your farm?

A Yes.

Q Did Mr. Lalli and Mr. Tolopka come to your place?

A Yes, they did.

Q Together?

A Yes.

Q After your cooperation began with Mr. Rogers, Mr. Barnaba, did you negotiate with Fred Lalli in 1972 and 1973 for the purchase of heroin?

MR. RICHMAN: Objection, your Honor.

THE COURT: No, I will permit it.

A Yes.

mbp4

Barnaba-redirect

Q Is this the same Fred Lalli who introduced you to Mr. Tolopka in 1967?

A Yes.

THE COURT: Mr. Curran, just for a moment would you put off your mike?

MR. CURRAN: I would if I knew how, your Honor.

THE COURT: There is no switch on it? I don't know, maybe it's just up here, but I am getting a terribly disturbing wow, and I can't figure out where it's coming from. It's some place in this courtroom.

MR. CURRAN: It's still on.

THE COURT: All right. If anyone knows where it's coming from and can stop it, please do.

All right, go ahead, Mr. Curran.

Q You testified, Mr. Barnaba, to a delivery of narcotics to Benjamin Tolopka's house in the absence of Mr. Forbrick from the veterinary hospital. Do you recall that?

A Yes.

MR. RICHMAN: Objection. There is no veterans hospital that I know of.

THE COURT: No, no, veterinary, animal hospital.

MR. RICHMAN: I am sorry.

Q Why did you deliver it to Mr. Tolopka on that

1 mbp5 Barnaba-redirect

2 occasion?

3 MR. RICHMAN: Objection, asked and answered
4 on direct.

5 MR. CURRAN: I don't believe so, your Honor.

6 THE COURT: I don't recall it. Go ahead, answer
7 the question.

8 A Because Richie wasn't home, and I assumed he was
9 at Ben's house.

10 Q Is that why you went to Tolopka's house?

11 A Yes.

12 Q After you got to the house, was Richard there?

13 A No, sir.

14 Q Why did you deliver it to Mr. Tolopka?

15 A Well, I knew him.

16 MR. RICHMAN: I object, your Honor.

17 THE COURT: No, I will permit it, "I knew him."

18 All right, go ahead.

19 Q Mr. Barnaba, were you asked in the grand jury by
20 Mr. Phillips in December of 1973 about the presence of a
21 black man in Tolopka's basement?

22 MR. RICHMAN: Objection.

23 A No, sir.

24 THE COURT: No, I will permit it. He was not.

25 THE WITNESS: No, sir.

1 mbp6 Barnaba-redirect 1837
2 Q Prior to your grand jury testimony on December 5,
3 1973, had you told Agent Shutes about this black man in
4 Tolopka's basement?

5 A Yes, I did.

6 Q Did you have any reason -- did you have or do
7 you have any reason to want to get even with Benjamin
8 Tolopka for anything?

9 MR. RICHMAN: Objection, your Honor. That is
10 a statement for the jury to determine.

11 THE COURT: I know, but he can make his state-
12 ment too. Go ahead, answer it.

13 A No, none whatsoever.

14 Q Mr. Barnaba, do you recall being cross-
15 examined yesterday by Mr. Ellis, the lawyer for the
16 defendant Mamone, about your debriefing session in Mr.
17 Rogers' office?

18 A Yes.

19 Q On November 14, 1972?

20 A Yes, sir.

21 MR. CURRAN: Would your Honor bear with me one
22 moment, please?

23 Q You were asked by Mr. Ellis, weren't you, about
24 a statement to Mr. Rogers, and I quote --

25 THE COURT: What page is this?

mbp7

Barnaba-redirect

1 MR. CURRAN: It's page 147.

2 MR. ELLIS: Do you have a page?

3 MR. CURRAN: 147.

4 MR. ELLIS: Do you have a page of yesterday's
5 transcript that you are referring to?

6 MR. CURRAN: No, I do not. I have the page from
7 the transcript of the debriefing session that I am referring
8 to.

9 MR. ELLIS: I didn't question at the debriefing
10 session, Mr. Curran. Your Honor, I object to this pro-
11 cedure.

12 MR. CURRAN: I haven't put a question yet.

13 THE COURT: I know. I am waiting till you do.

14 MR. CURRAN: I know, but Mr. Ellis was standing.

15 THE COURT: That is all right. You have done it
16 to others too.

17 Q Do you recall making the statement appearing on
18 page 147, "Can't put me in. If you put me in, forget about
19 it"?

20 A Yes, I do.

21 Q Did you say that to Mr. Rogers?

22 A Yes.

23 Q What did you mean by that statement?

24 MR. ELLIS: Objection, your Honor. The state-
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1 mbp8

Barnaba-redirect

2 ment speaks for itself.* His conclusions or his subjective
3 motivations are not evidence.

4 THE COURT: I will sustain it.

5 Q Mr. Barnaba, at that point in the debriefing,
6 were you discussing with Mr. Rogers the disposition of
7 charges against you, or were you discussing something
8 else?

9 MR. ELLIS: Objection, your Honor.

10 THE COURT: No, I will permit it. Go ahead.

11 A Discussing something else.

12 Q What was the something else?

13 MR. ELLIS: Objection.

14 THE COURT: I will sustain that.

15 MR. CURRAN: May I be heard on that?

16 THE COURT: Yes.

17 (At the side bar out of the hearing of the
18 jury, Mr. Curran, Mr. Rosenberg, Mrs. Rosner,
19 Mr. Ellis.)

20 MR. CURRAN: Briefly, your Honor, the point was
21 made time and again with this witness that he didn't want
22 to go to jail, and the point was made in connection with
23 this particular statement by him that he didn't want to go
24 to jail. In point of fact, in connection with this state-
25 ment, which is toward the end, as distinguished from any

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Barnaba-redirect

1 of the others about which defense counsel inquired, and
2 this one was inquired about, that is not the point he
3 was making there, your Honor, and it is the government's
4 position we are entitled to explain to the jury what he
5 meant, at least by that statement, because what he meant
6 was the testimony would be that if he was put in that night
7 if it came out that he had been busted, then his value as
8 a cooperating witness would be blown, and I think we are
9 entitled to bring that out in front of the jury.
10

11 MRS. ROSNER: Your Honor, I think, and I think
12 prior rulings in this trial bear me out, the government
13 is entitled to elicit any language around or about that
14 statement either before or after --

15 THE COURT: That is the problem. Do you know
16 what the language as to that statement is?

17 MR. ELLIS: It's in the transcript, your Honor.

18 MRS. POSNER: Yes, let him read from the
19 transcript. The language speaks for itself. The witness
20 is not now entitled to say, "That is what I said but I
21 meant something else."

22 THE COURT: He said, "I don't want you to put
23 me in jeopardy."

24 MR. ELLIS: Let him bring that out, fine.

25 MRS. ROSNER: That's it. That is the language,

1 mbp10 Barnaba-redirect

2 but he is not entitled to say what he meant by that.

3 THE COURT: All right.

4 MR. ELLIS: If that is what it says.

5 THE COURT: I thought you were trying to avoid
6 the word "jeopardy."

7 MRS. ROSNER: No, I have no objection to that.

8 (In open court.)

9 BY MR. CURRAN:

10 Q After that statement which you made to Mr. Rogers,
11 did you thereafter say, "I am going to do, but don't put
12 me in jeopardy"?

13 A Yes.

14 Q The defendant Mamone told you he would take care
15 of your Burke problem for you?

16 MR. ELLIS: Objection, your Honor.

17 THE COURT: I gather it's leading to something
18 else. I will permit it.

19 MR. ELLIS: No, your Honor, it's completely
20 contrary to the testimony. There is no testimony about
21 a friend of Mamone saying any such thing.

22 THE COURT: A friend of Mamone?

23 MR. CURRAN: I am sorry, I thought I said it
24 clearly. I said defendant Mamone.

25 MR. ELLIS: I am sorry. I misheard it.

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Barnaba-redirect

MR. CURRAN: I apologize.

THE COURT: All right, go ahead.

Q May I have an answer to that question?

A Yes.

Q After he told you that, were you ever bothered
Burke again?

A No, sir.

Q Did you ever know Burke's real name?

A No.

MR. ELLIS: Objection, your Honor. It implies
that the name Burke is an alias.

THE COURT: It may or may not be.

MR. ELLIS: There is no evidence in the record
that is an alias.

MR. CURRAN: There is testimony on direct as
to what the introduction name was. The name was given simply
as Burke.

THE COURT: I know that, and it's just the same
thing as he says he doesn't know the first and last name.
Not that it's necessarily an alias.

MR. ELLIS: Your Honor, I would have no objection
if the question were, did he ever know Burke by any other
name.

MR. CURRAN: I wonder if maybe Mr. Ellis would

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Barnaba-redirect

ask his questions.

THE COURT: No, no. All right. Go ahead.

MR. CURRAN: I think it was answered.

THE COURT: Yes, it was.

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Q Burke's car, do you remember what state

3

license plates it carried or bore?

4

A Pennsylvania.

5

Q Do you know the defendant Mamone's wife?

6

A Yes.

7

Q Did you know her before she was married?

8

A Yes.

9

Q Do you know her first name?

10

A I believe it is Phyllis.

11

Q Did she ever live near the animal hospital

12

on Boston Post Road?

13

A Yes.

14

MR. ELLIS: I object, your Honor, on the

15

ground of relevancy.

16

THE COURT: No, no, I will permit it.

17

Q The answer was?

18

A Yes.

19

Q Approximately how long ago, to the best of

20

your recollection?

21

A The early '60s.

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MR. ELLIS: Your Honor, I also object to

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this line of questioning on the grounds it was improper

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THE COURT: No, I will permit it.

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Barnaba-redirect

1844

Q Were you ever present with her at the animal hospital in the company of Richard Forbrick and Mrs. Forbrick?

A Up Richie's house, yes.

Q Which is above the animal hospital?

A Yes.

Q In the same building?

A Yes.

Q More than once?

A Yes.

Q Were she and the Forbrick's good friends?

A As far as I knew, yes.

MR. ELLIS: Objection.

THE COURT: Yes. I will sustain the objection.

Ladies and gentlemen, ignore the last answer.

Go ahead.

Q Mr. Barnaba, you testified on a number of occasions to this jury that you don't want to go to jail, is that right?

A Yes.

Q Have you been told by me or by Mr. Phillips or by anybody connected with the federal or state govern-

ment that you can help yourself by lying at this trial?

A No, sir.

Q As a matter of fact, Mr. Barnaba, I told you the contrary, didn't I?

A Yes, you did.

MR. ELLIS: Objection.

MRS. ROSNER: Objection.

MR. DOWD: Objection.

THE COURT: Sustained.

Q You were questioned this morning by Mr. Dowd about your grand jury testimony as to the defendant Russo; do you recall that?

A Yes.

MR. CURRAN: Will your Honor bear with me one moment?

THE COURT: Yes.

Q You testified before the grand jury, Mr. Barnaba on two occasions, October and December, right?

A Yes.

THE COURT: Keep your voice up, please, Mr. Witness.

A Yes.

Q I direct your attention to your October, 1973 grand jury testimony and ask you how many pages that

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A Yes, sir.

Q With respect to the defendant Russo, hwo many questions were you asked by Mr. Phillips in the grand jury about the defendant Russo?

A Three.

Q Did you answer those questions?

A Yes, I did.

Q You were asked, Mr. Barnaba, also about a May, 1971 date, May of 1971, in about May of 1971, this morning; do you recall that?

A Yes.

Q You testified that you placed this Russo transaction when, in your testimony?

A August, '71.

Q Other than the change in the date, did the facts change in any way?

MR. DOWD: Objection, your Honor.

A No.

THE COURT: Was there an objection?

MR. DOWD: I objected, your Honor.

THE COURT: All right. No, I will permit it.

Q Now, Mr. Rogers told you that, or suggested to you, at least, Mr. Barnaba, when you were arrested that November 14, 1972 night, suggested the existence of an A

felony charge against you, is that right?

A Yes, he did.

Q You know whether Mr. Rogers had evidence that you had committed an A felony?

MR. SIEGEL: Objection, your Honor.

THE COURT: No, I will permit it.

Q You don't know whether Mr. Rogers told you that you could be charged with an A felony in order to secure your cooperation.

MRS. ROSNER: Objection.

MR. ELLIS: Objection.

MR. FISHER: Objection.

Q If you know.

MR. ELLIS: It calls for the operation of his mind.

THE COURT: Yes, I know. Sustained.

Q You have been indicted for an E felony in the state court, is that right?

A Yes, sir.

Q Do you know what the maximum penalty for that is?

A Four years.

Q Are you under indictment in this court?

A I am.

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Q Did you have a conversation with Mr. Phillips before that indictment was filed naming you?

A Yes.

Q What did Mr. Phillips tell you about that indictment?

MR. ELLIS: Objection.

THE COURT: No, I will permit it.

Q You may answer, Mr. Barnaba.

A That I was indicted, and that he would not prosecute on it.

Q He told you that before you testified before the grand jury, is that right?

A Yes.

Q After that the indictment came down naming you?

A Yes.

Q Did he tell you why you were being named?

MR. ELLIS: Objection, your Honor.

MRS. ROSNER: Objection.

THE COURT: Yes, I will sustain that.

Q Did you have any conversations about narcotics transactions in the summer and into the fall of 1972.

MR. ELLIS: Objection, your Honor. With whom?

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Barnaba-redirect

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THE COURT: With anyone, I gather.

MR. CURRAN: With anyone.

MR. ELLIS: I object on the grounds of
irrelevancy.

THE COURT: No, I will permit it.

A Yes.

Q You testified on cross examination this morning
that you had a conversation with Patty Dilacio at his
apartment in about the month of December, 1971 at
which time Dilacio told you he didn't have any narcotics.
Do you recall that?

A Yes.

Q Could that conversation -- could it have taken
place in January of '72?

MR. LOPEZ: Objection, your Honor.

THE COURT: No, I will permit it.

A It could have.

MR. CURRAN: Would your Honor bear with me
one minute, please?

Q After your arrest on November 14, 1972,
specifically directing your attention to November 22,
1972, did you have a conversation about narcotics
with the defendant Inglese?

MRS. ROSNER: Objection to form, conclusory.

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Barnaba-redirect

The words speak for themselves.

THE COURT: No, I will permit it.

A Yes.

Q Where did this conversation take place, Mr. Barnaba?

A Outside the Blue Lounge in the Bronx.

Q Before you spoke to the defendant Inglese did you speak to anybody else?

A Yes, I did.

Q Who was that?

A Finnegan.

Q The defendant Finnegan?

A Finnegan.

Q The defendant Christiano?

A Yes.

Q Was this conversation recorded, to your knowledge?

A Yes, it was.

Q You were wearing a tape recorder?

A Yes.

Q This is under the supervision of Mr. Rogers' office?

A Yes.

Q Have you since November 22, 1972, listened to

1 that recorded conversation?

2
3 A Yes, I have.

4 Q Have you also within the past approximately
5 two weeks had a chance to examine what purports to be a
6 transcript of that recorded conversation?

7 A Yes, I have.

8 Q And did you compare the recorded conversation
9 which you listened to with this transcript?

10 A Yes.

11 Q And do they coincide?

12 MR. ELLIS: Objection.

13 MRS. ROSNER: Objection.

14 THE COURT: Do they coincide? No, I
15 will sustain the objection.

Q You compared the recorded conversation with the transcript which was in front of you, is that correct?

A Yes.

Q Did the statements which appear in the transcript with the names on the left side of the transcript correspond to what you heard on the tape?

MR. FISHER: If your Honor please, I would object. If the tape is in existence, it can be made and it will speak for itself.

THE COURT: I would suggest you gentlemen come up to the side bar.

(At the side bar.)

MR. CURRAN: Your Honor, this question was simply to nail counsel that he made the appropriate comparison. I have the tape and I intend to play it right now, subject to your Honor's permission, since defense counsel suggested it, but I do have a transcript which I wanted the witness to compare and I want to offer the transcript as well and give copies to the jury. That is the reason for this line of questioning. I am prepared to play the tape as well and we have the machine and the tape here.

MR. FISHER: Your Honor, I would object to

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the introduction of the transcript. It is nothing
more than this witness' conclusion as to what the tape
says.

THE COURT: You want the tape played?

MRS. ROSNER: I objected under United States
vs. Padrone for this reason. At the opening of the
trial I indicated to your Honor that no motion to
suppress had been made, although we were given what
purports to be a Rule 16 statement in the form of this
recording by the government for the reason that the
government represented at that time that they had no
intention to offer that statement and counsel acted in
reliance on that in not moving to suppress and in not
moving for a pretrial hearing on the audibility of the
tape.

Now Mr. Curran thinks he will get up in the
middle of a trial and play a tape which is virtually
inaudible and have this witness give his rendition of what
that said is highly improper. The cases in this
circuit are legion. You are entitled to a pre-jury
hearing on audibility. They are not entitled to spring
it on you after they represent that they are not going
to use it.

MR. CURRAN: Your Honor, this tape and the

transcript was made available to all defense counsel at least five weeks ago.

MRS. ROSNER: I don't dispute that.

MR. CURRAN: May I finish.

There is no surprise whatsoever. Mr. Phillips told defense counsel, as I understand it -- I wasn't present -- that he did not intend to use the tape in the direct examination of the witness Barnaba or, indeed, the direct examination of any witness.

However, your Honor, when the witness is examined, for example, on cross examination by Mrs. Rosner: after your arrest on November 14, 1972, you "never got a grain of heroin from the defendant Inglese," and he answered "No," it seems to me, your Honor, we are certainly entitled to get the full picture before the jury where in fact they had a narcotics conversation on November 22nd talking about kilo lots, and I don't think it is proper for defense counsel to suggest that because we said something and we stuck with it, therefore they could go all over the lot with this witness and our hands are tied and we can't bring in proper evidence.

MRS. ROSNER: The transcript which was read into the grand jury minutes is substantially different from the transcript which we obtained from Adler

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rka

Barnaba-redirect

1857

Reporting Service.

I am entitled to have settled by your Honor questions as to what the transcript should reflect. They can't put anything on that they want the jury to see and we are entitled to an audibility hearing before it gets played.

THE COURT: Why not let the jury go right now. It's time for the afternoon break.

MR. CURRAN: Your Honor, I think this whole tape runs about five minutes and the audibility hearing, no matter where it is going to go, will take five minutes. The tape is less than that.

MRS. ROSNER: I know that you have had legal problems foisted upon you at every recess, but I suggest you take a look at Padrone, which is a Second Circuit case in 1969. They reversed off the bench and wrote the opinion later when the government did something like this.

THE COURT: Those things have been known to happen..

Let me let the jury go right now.

(In open court.)

THE COURT: Mr. Marshal, I know even though your luncheon schedule was different, it is still time for

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Barnaba-redirect

1858

2 the afternoon break. I will ask the marshal to take
3 the jury out now.

4 (The jury left the courtroom.)

5 MR. DOWD: Your Honor, I wanted to bring
6 to the court's attention, while Mr. Barnaba was sitting
7 in the chair a marshal was standing to his right as you
8 face him and was talking to Mr. Barnaba, and as I observed
9 him he appeared to say, "It's all right, you are doing
10 okay."

11 I was lip reading, admittedly, but he is very
12 close to the jury and I would be concerned about a
13 marshal telling a witness "You are doing okay" and if a
14 juror heard it, because it puts the weight of the govern-
15 ment telling a witness he is doing well. I am sure
16 it must have been innocent but still in all --

17 THE COURT: I will have the marshal sit down
18 back toward the wall.

19 THE MARSHAL: I wasn't the marshal, but the
20 No. 6 juror did complain that the stenographer is constantly
21 in his view.

22 THE COURT: I understand.

23 THE MARSHAL: That is the reason I am up
24 here.

25 MR. DOWD: I was referring to the marshal

standing next to him.

THE COURT: We will put him back against the wall.

MR. KING: If your Honor please, I have asked the government through Mr. Fortuin, to identify the tapes, the transcript of the tapes, we got of Harry Pannirello. We got one in January; then we got four different ones yesterday, and the ones we got yesterday, if your Honor please, on a number of them there are no dates, there is no date on the one we got in January. We have no way of knowing when this transcript or debriefing took place.

I think the record should show that there is a number of them that are not identified.

THE COURT: Mr. Fortuin, if you can identify them, will you identify them for Mr. King.

MR. POLLACK: In connection with the Pannirello tapes, your Honor, I am advised by other counsel that the transcript that we received yesterday is not complete in that it does not have both sides of the second tape and I believe a portion or all of the third tape is missing. I wonder if the government is going to furnish it.

THE COURT: Hopefully you can work that

1 out with the Government. I have to do some reading
2 right now.
3

4 What was the name of that case?

5 MRS. ROSNER: P-a-d-r-o-n-e, United
6 States against Padrone, the Second circuit.

7 THE COURT: Mr. Curran, how much longer do you
8 expect on redirect?

9 MR. CURRAN: Your Honor, after the tape,
10 that would be it. After that I shall --

11 MR. PHILLIPS: Does your Honor want to
12 listen to the tape now? We are prepared to play it.
13 I believe Mrs. Rosner asked for an audibility hearing.

14 MR. CURRAN: It is all ready to go.

15 THE COURT: Is it on a small tape cassette?

16 MR. PHILLIPS: No, it's on a reel-to-reel
17 we have right here.

18 THE COURT: Bring it inside. --

19 (Recess.)

20 (In the robing room.)

21 THE COURT: The record should reflect that
22 we have had a robing-room conference with Mr. Curran,
23 Mr. Phillips, Mr. Fortuin, Mr. Engel, Mrs. Rosner and
24 Mr. Fisher, during which time a tape recording which
25 is to be offered by the government has been played.

Mr. Fisher indicated he wished to make some remarks about the recording.

MR. FISHER: Yes, your Honor. I think the record has established, without commenting on the propriety or impropriety of the offer at this point, and without suggesting that it is proper at this point, first, that defendants ought to have an opportunity now, before the introduction of this tape, to submit it to experts to determine whether or not it is a legitimate tape or, instead, whether or not something has been done to it.

Secondly, the government ought to be compelled to produce the instrument upon which this tape is supposed to have been made, literally, the instrument.

Third, any reports or memoranda relating to the signing out and use of said instrument must, I submit, be turned over prior to the introduction of this tape.

Further, your Honor, with regard to the question of transcripts, I notice that as your Honor was listening to the tape, your Honor was guided by a transcript prepared by, I think, the government --

MRS. ROSNER: No.

1 kpl

3B

2 MR. FISHER: By Adler.

3 I eschewed the opportunity to consult the
4 transcript and I think that is what the jury ought to do.
5 I think when you read a transcript, it may perhaps suggest
6 to you something that is not in your head as a result of
7 the tape. The tape is being offer, as I understand, proof
8 that this conversation and those words were spoken.

9 I don't think any interpretation or opinion of what those
10 words are should be submitted. I think it is more sug-
11 gestive than it probably would help the legitimate interests
12 here.

13 This is, admittedly, I think, not a very good
14 tape. Mr. Phillips long ago told us it was difficult
15 to hear and I am sure your Honor knows that is quite the
16 case.

17 In view of the fact that this is not a very good
18 tape at all, the chance of misidentification of the words,
19 I think, is enhanced.

20 In the event it goes in, and I certainly hope
21 it doesn't, I would submit that only the tape should go
22 in, your Honor, and nothing else.

23 MRS. ROSNER: I would add a few words to what
24 Mr. Fisher has already told your Honor.

25 I think the law in the circuit is clear that

1 kp2

2 the Court pretty much has discretion on an audibility
3 hearing to determine whether the tape itself as opposed
4 to any transcripts are audible enough and intelligible
5 enough to be of evidentiary value.

6 I would suggest, your Honor, that for reasons
7 which will follow, this tape does not meet those criteria.

8 We have bits and pieces of phrases out of
9 context of whole sentences.

10 If this were a situation where there were two
11 minutes of inaudibility at a time in anotherwise audible
12 tape, I would not make this objection, but we have a tape
13 where segments and parts of sentences and phrases are
14 obliterated and not intelligible, making what does appear
15 on the tape out of context and unintelligible, and, I would
16 submit, your Honor, that the quality of the tape is such
17 that the Court should, in its discretion, hold that it does
18 not possess sufficient evidentiary value to be played to
19 the jury. That does not mean, your Honor, that
20 Barnaba cannot recite to the jury his recollection of the
21 conversation as it occurred, which testimony, of course,
22 is subject to cross-examination.

23 My chief point, your Honor, is that the tape,
24 as both transcripts, although they differ in some respects,
25 it is inaudible to such an extent throughout so as to

render what can be heard, no more than out of context phrases.

I would suggest, your Honor, that although Barnaba can testify to what was said, the tape itself is not probative evidence because of the quality of the recording.

MR. FISHER: I warmly endorse and agree with Mrs. Rosner's application.

MRS. ROSNER: Secondly, your Honor, I would further suggest, as Mr. Fisher pointed out, if your Honor decides it has any probative value, I think it should be played for the jury without the aid of transcripts.

THE COURT: That is what Mr. Fisher said.

MRS. ROSNER: It is the tape and not anyone else's idea as to what the tape says, and I suggest anyone attempting to put down what this tape says is doing no more than guessing at the wording, and that is the kind of speculation which would never be permitted in evidence if a witness tried to do it, and that is really all you can do when you listen to this tape.

If you think they ought to hear it all, if it serves any purpose, they ought to be allowed to listen to it, but they certainly shouldn't have anyone's conjecture as to what it says.

For instance, when the people at Adler made

1 kp4

2 this transcript, they told me they played the tape over
3 five and six times for every few inches to try to get out
4 what they thought was being said and that is the only thing
5 you can get out of this and it is unfair to have sug-
6 gestions printed on paper as to what is said given to the
7 jury. That is unfair and that is what we are objecting
8 to.

9 MR. FISHER: Your Honor, there is one more
10 application I would like to make.

11 Towards the end of the last week, I went up
12 to Mr. Phillips and I asked Mr. Phillips if he intended
13 to introduce that tape. Mr. Phillips responded he wasn't
14 sure, I should speak with Mr. Curran. Mr. Curran indicated
15 that at that time he had no intention of offering the tape.

16 If your Honor please, I think we are dealing
17 here with something in the poker vernacular called sand-
18 bagging.

19 Quite seriously, perhaps we lose sight of what
20 we are doing here but hopefully we are not involved in any
21 kind of poker game or any kind of game at all.

22 I know that Mrs. Rosner may well have, and
23 certainly I did, carefully framed my cross-examination,
24 and I assure you it may not have appeared that way but
25 it was carefully prepared, your Honor, with my under-

1 kp5

2 standing of the government's position with regard to that
3 tape.

4 I should also state that quite candidly I was
5 wondering what is with this tape that the government
6 wasn't going to offer and it occurred to me that perhaps
7 there was something wrong with it, and for that reason,
8 the government couldn't offer it.

9 Now, I think in view of the fact that Mrs.
10 Rosner and I have committed ourselves to a line of inquiry
11 in cross-examination which was based upon what we under-
12 stood the government's position to be with regard to these
13 tapes and it was a consistent position all along, I don't
14 think, really, the government should be allowed to, in
15 the vernacular, sandbag us and the defendants at this
16 time.

17 MR. CURRAN: May I be heard?

18 THE COURT: Surely.

19 MR. CURRAN: Your Honor, I think there are
20 basically four points that have been made by Mr. Fisher
21 and Mrs. Rosner. I would like to deal with the sand-
22 bagging first.

23 As I said up at the side bar conference, Mr.
24 Phillips did indeed, I believe, tell defense counsel,
25 at least some of them, at least particularly Mr. Fisher

1 kp6

2 and Mrs. Rosner, that the government did not intend to
3 offer a tape in the direct testimony of Mr. Barnaba, in
4 the direct case.

5 The tape was made available to defense counsel
6 five or six weeks ago. That was the government's in-
7 tention.

8 However, I repeat to your Honor and recall to
9 your Honor, the cross-examination, and more specifically,
10 the questioning of the witness Barnaba by Mrs. Rosner where
11 one question was, "You haven't even got one grain of heroin
12 from Inglese since November 14, 1972," and Mr. Barnaba said
13 he had not.

14 There was another question that had to do,
15 as I recall, with narcotics transactions since November
16 14, 1972, and I submit, your Honor, it is not a question
17 of sandbagging, it is not a game, but when the witness
18 is hit with questions like that in front of the jury,
19 the jury is entitled in the interest of justice to see
20 the full picture of what the witness does know and doesn't
21 know and is entitled to see the full picture of what the
22 defendants Inglese and Christiano did or did not say.
23 That is not sandbagging at all.

24 With respect to point No. 2, which really runs
25 into the last part of point No. 1 that I just discussed,

1 kp7

2 the question of audibility, your Honor, I think is a simple
3 one. Your Honor has already in effect had the audibility
4 hearing. Your Honor heard the tape. I don't agree
5 that it is largely inaudible at all. I submit it is
6 largely audible, and as your Honor knows, tapes are
7 excluded by the Court only where they are most sub-
8 stantially or at least substantially inaudible. That
9 is not the case here. This tape is quite audible.
10 The portions that come across, most of them come across
11 quite clearly.

12 I submit also, your Honor, point three, that
13 the question of the original tape and the instrument and
14 the other points referred to briefly by Mr. Fisher,
15 go not to the admissibility of this tape and the transcript
16 but go to the weight which the jury wants to give to the
17 tape.

18 Finally, your Honor, with respect to the
19 transcript about which the witness Barnaba has testified,
20 we thoroughly agree with defense counsel that the tape
21 is the evidence, the best evidence and, indeed, the
22 only evidence, but we also submit, your Honor, it is
23 quite clear that the jury, as an aide memoir, is entitled
24 to hang this transcript for its use as the tape is played,
25 particularly since the foundation has been laid, the

1 kp8

2 witness Barnaba listened to the tape I believe twice,
3 recently, and compared it with the transcript and went
4 over the transcript which had been prepared by a steno-
5 grapher in my office after she listened to it and made
6 appropriate suggestions to her and made this final
7 comparison, and we are not suggesting that the transcript
8 is the evidence. The tape is clearly the evidence, but
9 I submit, your Honor, just as any graphic evidence is
10 permissible, it is permissible in this case for the aid
11 of the jury, and that is the purpose for which we offer
12 it.

2 13 Of course, Mr. Phillips reminds me that the
14 Judge, of course, your Honor, should, if he decides to
15 permit the jury to hear the transcript, charge the jury
16 that it is not the evidence, the tape is the evidence,
17 and nonetheless, it is like a chart, and like any sort
18 of graphic evidence, it is an aid to the jury in
19 understanding the evidence.

20 MRS. ROSNER: If I may respond very briefly,
21 I think these few comments should be made.

22 The government did not represent that they
23 were not going to introduce this tape as the result of any
24 bargain that counsel would not make certain inquiries.
25 That was not the case and Mr. Curran doesn't say it was.

1 kp9

2 I did not ask Mr. Barnaba whether he had any
3 conversation with Mr. Inglese about narcotics after
4 November. That is just a factual point that should be
5 made, not that I think it has any relevance to the govern-
6 ment's position.

7 Just as your Honor sustained objection to Mr.
8 Curran's attempts to elicit from Barnaba his comparison
9 of the transcript to the tape for accuracy, your Honor,
10 we contend you can't cross-examine the transcript to find
11 out why the person who wrote the words, wrote the words.
12 The question is, what the unaided ear can hear. That is
13 the evidence, not what the agent who prepared this thought
14 he heard or would have liked to have heard, and I submit,
15 your Honor, contrary to what Mr. Curran said, it is the
16 law in this circuit under United States v. Nohl, that if
17 a tape is substantially inaudible, it is inadmissible.
18 It doesn't go to the weight to be given to it, it is
19 inadmissible.

20 MR. CURRAN: I agree with that, your Honor.
21 If it is substantially inaudible, it is inadmissible.
22 We claim it is audible.

23 MRS. ROSNER: The government's needs are amply
24 met by having Barnaba testify to the recollection, to his
25 recollection as to the contents of the conversation.

1 kpl0

2 That is cross-examinable. An inaudible tape with gaps in i
3 is not.

4 THE COURT: Thank you. will you all leave
5 now.

6 Mr. Warner, do you have something?

7 MR. WARNER: I did have something, but it can
8 wait.

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(In open court, jury not present.)

THE COURT: Mr. Curran, this tape recording that you have offered finishes your redirect; is that correct?

MR. CURRAN: Yes, your Honor.

THE COURT: I have listened to the tape recording and discovered that I am terribly unmechanical in trying to put it back together again, but I did get it back together again, and I think, one, that the tape is audible; that the jury should be permitted to hear it. I understand that you have a transcript prepared also, Mr. Curran. I am going to let the jury see the transcript, but I am going to tell them that anything that they don't hear on the tape to ignore as far as the transcript is concerned.

Does everybody understand exactly what is going to happen? Mrs. Posner, do you want to add something?

MRS. ROSNER: Yes, your Honor. We had a transcript prepared by a third party with no interest in the proceedings at all, and it differs substantially from the government's transcript.

THE COURT: I want them both marked.

MRS. ROSNER: Sorry, your Honor?

THE COURT: I want them both marked.

1 mp2

2 MRS. ROSNER: I would suggest, your Honor, in
3 view of the lateness of the hour, that counsel be per-
4 mitted to duplicate the transcript, which was made by
5 Adler Reporting Service, and that that be given to the
6 jury as an aid in listening. The differences, I think,
7 are critical, and at the very least the jury should have
8 both versions before them, not just the version prepared
9 by a law-enforcement authority.

10 MR. CURRAN: The government has no objection
11 to the jury having both transcripts available. We would
12 request, however, that the tape be played twice at least,
13 and should there be a request for more, we'd like that
14 too, for the jury.

15 THE COURT: I am sure you'd like more, but I
16 guarantee you there is going to be a maximum of twice.

17 MRS. ROSNER: I would object to it being
18 played a second time, your Honor. It would be like
19 asking a witness a critical question two times. Objection
20 would certainly be sustained to that on the ground that
21 it had been asked and answered.

22 The government is not entitled to --

23 THE COURT: No, the problem is, Mrs. Rosner,
24 you want the Adler transcript used. Unfortunately, while
25 everybody has two eyes, they can focus on only one thing,

1 mp3

2 and if they are going to follow through on one transcript
3 and then another transcript, it is going to have to be
4 played at least twice.

5 MRS. ROSNER: What I am suggesting, your
6 Honor, is not that they be given two transcripts, but
7 that your Honor, as a finder of fact in context of this
8 audibility hearing, compare both transcripts and determine
9 which if either accurately transcribed what is audible on
10 that tape, and that the jury be given the settled, agreed
11 version, not the government's one prepared by some govern-
12 ment agent.

13 MR. CURRAN: No, your Honor, the testimony is
14 that the witness listened to the tape --

15 THE COURT: I am aware of it.

16 MRS. ROSNER: That is not permitted --

17 THE COURT: He said he listened to the tape,
18 yes, and that he went through it with the transcript.
19 That is my understanding of the last thing.

20 If you want the Adler transcript used, we are
21 going to have to play it twice.

22 MRS. ROSNER: I don't think that is fair,
23 Judge. Why is there a presumption that the government's
24 transcript is more accurate or should be given to the
25 jury?

1 mp4

2 THE COURT: Let's put it this way. The reason
3 I believe the government's transcript is more reliable is
4 because I heard what is on the government's transcript when
5 I was playing the thing inside. I listened reading with
6 the first time with the transcript, the Adler transcript.
7 I heard things which were not in the Adler transcript.

8 I played it again twice more, and theirs is
9 the best of the two by far. Indeed, the government
10 transcript is closer to what I heard. I think if anything
11 I heard some things which are not reflected in the govern-
12 ment's transcript. All right?

13 MR. FISHER: Your Honor, may I have one
14 moment?

15 THE COURT: Yes, Mr. Fisher.

16 MR. FISHER: To confer with Mrs. Rosner.

17 If your Honor please --

18 THE COURT: Yes?

19 MR. FISHER: I would ask, and I believe Mrs.
20 Rosner agrees, that the tape be played, in view of your
21 Honor's ruling, as you indicated, twice, that that be
22 done in the following method: it should be played first
23 without any transcript whatever. Then and only then can
24 the jury realize to what extent they are relying on the
25 transcript, and to what extent they are relying on the

1 mp5

2 tape. The second time only they should be allowed the
3 transcript.

4 MR. CURRAN: Your Honor, the government's
5 position on that is that, as your Honor has indicated,
6 that an appropriate charge takes care of any possible
7 problem of that nature. We have conceded already in the
8 conference in the robing room, your Honor, that the
9 transcript itself is not evidence, the tape is, and it
10 is offered as an aide-memoire to the jury.

11 MR. FISHER: Your Honor, I don't see where
12 the -- if the government is really sincere in what it just
13 said, how does it hurt at all by letting the jury hear the
14 tape without any suggestions as to what the tape says?
15 Then they can hear it again with the aid of the transcript.

16 MRS. ROSNER: I would concur in that procedure.

17 THE COURT: All right, I will go along with
18 that.

19 MR. FISHER: Your Honor, I have sad news. In
20 view of this attenuation of the Barnaba testimony, may I
21 remind you, your Honor, that I have to be in the Court of
22 Appeals tomorrow morning, and that I cannot in good
23 conscience leave while, frankly, an unmitigated disaster
24 is about to befall.

25 MR. CURRAN: Is it possible to sit for a while

1 mp6

2 this evening?

3 THE COURT: No, we will play the tape this evening
4 and get that out of the way. That means you will be
5 finished. Mr. Fisher, I assume that you would want to kick
6 off on recross; is that the problem?

7 MR. FISHER: I don't care whether I kick-off or
8 punt or what, your Honor, but I am just worried. I would
9 just like to be here during the full recross, all further
10 testimony of Barnaba.

11 THE COURT: When are you going on at the Court
12 of Appeals?

13 MR. FISHER: I don't know, your Honor. I am
14 not sure, but I believe they could be persuaded, the Court,
15 to hear me first, which would be at or about 10.30 tomorrow
16 morning, and I imagine I would be down here by about 11
17 o'clock.

18 THE COURT: Well, I have tried to convince the
19 Court of Appeals from time to time, and I found myself
20 unable to do so, so don't bet on it.

21 Is this a full-blown appeal that you are on or
22 just a motion?

23 MR. FISHER: Full appeal, your Honor.

24 THE COURT: All right. I tell you what. We
25 will play the tape tonight now, once, and then the second

1 mp7

2 time with the transcript. Mr. Curran will rest. Come
3 back here at 10 o'clock and I will see what I can do about
4 getting you out of the Court of Appeals fast. All right?

5 MR. FISHER: There is one additional applica-
6 tion, if your Honor please, after the jury is back tonight.

7 THE COURT: I assume so. I haven't had an
8 evening where there haven't been.

9 MR. CURRAN: Your Honor, before the tape is
10 played, I have two questions to the witness. It's really
11 one question, a preliminary and then an ultimate question
12 of the witness Barnaba. That would include the redirect.

13 THE COURT: All right, but let's get it done.

14 MR. CURRAN: Yes, sir.

15 MR. SIEGAL: Your Honor, I would have one
16 request, and that would be a limiting instruction for the
17 defendants who are not involved in this tape to the jury
18 saying that --

19 THE COURT: Yes, I understand. Will you set
20 up the tape recorder?

21 MR. PHILLIPS: It's all set up.

22 MR. ENGEL: It's on the table.

23 THE COURT: It is all set up?

24 MR. PHILLIPS: Yes.

25 THE COURT: All right, bring back the jury.

2

(In open court; jury present.)

3

THE COURT: Would it be better if I could raise up this platform? Is that the problem?

5

6

JUROR NO. 6: Yes, Judge. Usually the reporter's head is right in line with the witness.

7

8

THE COURT: I understand. Let me see what I can do overnight and maybe tomorrow see if I can raise the platform, all right?

10

JUROR NO. 6: Thank you very much, sir.

11

THE COURT: All right, Mr. Curran.

12

BY MR. CURRAN:

13

14

Q Mr. Barnaba, you are reminded you are still under oath. You understand that?

15

A Yes.

16

Q Do you know a man named Lentini?

17

A Yes.

18

Q Do you know his first name?

19

A Moe.

20

21

Q Directing your attention to the situation which you testified about before the recess, the Blue Lounge, outside the Blue Lounge November 22, 1973 --

22

23

A Yes.

24

Q -- 1972 -- was Moe Lentini there?

25

A Yes.

A A few minutes, yes.

Q Mr. Barnaba, I show you a document consisting of three pages which has been marked Government's Exhibit 66 for identification and I ask you if you recognize that document.

1

A Yes.

2

3

Q What is it?

4

A A transcript of the tape.

5

6

Q The transcript that you previously testified about?

7

A Yes.

8

9

Q I direct your attention up top here to the date that's been typed, November 22, 1973, and a change to 2.

10

A Yes.

11

Q It is 1972, isn't it?

12

A Yes.

13

Q You didn't type the date on, did you?

14

A No.

15

Q That was done by somebody else?

16

A Yes.

17

18

MR. CURRAN: Your Honor, I offer in evidence Government's Exhibit 66 for identification.

19

MR. FISHER: Objection, your Honor.

20

21

MRS. ROSNER: Is that the transcript, your Honor?

22

THE COURT: The transcript.

23

24

MRS. ROSNER: Objection. The transcript is not evidence.

25

THE COURT: Yes, I know.

1 MRS. ROSNER: As a matter of fact, your
2
3 Honor, I bottom my objection on the best-evidence rule.

4 THE COURT: All right. I understand.
5 However, even aids for the use of the jury before they
6 are shown to the jury are marked in evidence under the
7 circumstances. I will give the appropriate instruc-
8 tion.

9 MRS. ROSNER: Most respectfully, Judge, I was
10 just going to point out what I think is usually done
11 is they are marked for identification but they are not
12 admitted in evidence.

13 THE COURT: You mean to say it doesn't matter
14 if the jury sees the transcript although it is not marked
15 in evidence?

16 MRS. ROSNER: Correct, your Honor, it is not
17 in evidence. It is merely and aid.

18 THE COURT: I agree.

19 MRS. ROSNER: They are not marked in evi-
20 dence, Judge, my understanding is.

21 THE COURT: Well, does anyone have any objec-
22 tion to it being shown to the jury even though marked
23 for identification as requested by Mrs. Rosner?

24 MR. FISHER: None further than the objec-
25 tions already raised.

2 THE COURT: All right. It will remain
3 marked for identification.

4 MRS. ROSNER: Thank you, your Honor.

5 Mr. Curran, I gather you are going to
6 play that tape now, is that correct?

7 MR. CURRAN: Yes, your Honor, Mr. Engel is
8 going to play the tapes.

9 THE COURT: Mr. Engel is the engineer; is
10 that it?

11 MR. CURRAN: Yes.

12 MR. SIEGAL: May we know who they are being
13 offered against?

14 THE COURT: Yes.

15 Mr. Barnaba, the voices on the tape, will you
16 tell us who the voices are?

17 THE WITNESS: Yes, sir. Finnegan, Gigi,
18 Moe Lentini and myself.

19 THE COURT: Now, ladies and gentlemen, the
20 tape is going to be played twice. The tape and what
21 you hear from the tape is the best evidence as to what went
22 on that night. We are going to play it once without
23 any reference to this transcript that has been alluded
24 to. The reason for that is this: I want you to
25 listen very closely to the tape the first time. What

you hear from the tape is what is evidence. If on the second go-round you use the transcript, it is merely as a visual aid, but if you don't hear what's on the transcript, you ignore that part of the transcript. Do you understand? All right.

Oh, by the way, let me just ask one question: Mr. Barnaba, this tape was made outside the Blue Lounge, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Where is the Blue Lounge?

THE WITNESS: On Buhre Avenue in the Bronx.

THE COURT: Buhre Avenue in the Bronx. Is that near Westchester Avenue?

THE WITNESS: Right off Westchester Avenue, yes.

THE COURT: All right. And Westchester Avenue is the Pelham Bay division of the IRT?

THE WITNESS: Yes.

THE COURT: And that is the elevated train, is that correct?

THE WITNESS: Yes.

THE COURT: All right, go ahead, play the tape.

(Tape played.)

THE COURT: Mr. Curran, you can now pass out Government's Exhibit 66 for identification.

MR. CURRAN: Your Honor, the copies are not marked 66 for identification, but they are copies.

THE COURT: It doesn't matter.

MR. FISHER: Your Honor, I would like to renew at this time my objection to the transcript. I respectfully differ with the finding. I don't think it is audible.

If your Honor please, I submit the transcript can only suggest to the jury what can't be heard on the tape.

THE COURT: Ladies and gentlemen, let me just once again -- don't even look at that transcript for a moment -- anything that is on that transcript that you haven't heard is not to be considered by you as evidence. They are going to play the tape once again now, but if you didn't hear it, if you don't hear it, don't count on it. It is not evidence.

MR. ELLIS: I would like to object at this time to the introduction of the tape in so far as it may be offered against Mamone.

THE COURT: As you recall, this witness indicated that the people who were there at the time,

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2 his testimony of the people that were there at the time
3 this conversation took place, were Finnegan, Mamone, Gigi
4 and himself.

5 Is this hooked into the loudspeaker system
6 in the courtroom or is it working on its own loud-
7 speaker?

8 MR. ENGEL: It is working on its own.

9 THE COURT: Is that microphone near the
10 machine on or off?

11 MR. ENGEL: We can turn around so the
12 speaker faces it.

13 (Tape played.)

14 THE COURT: Mr. Curran, I assume that
15 finishes your redirect?

16 MR. CURRAN: I have one or two questions;
17 then I will be through.

18 THE COURT: Ladies and gentlemen, would you
19 pass down the transcripts.

20 MR. CURRAN: May I proceed, your Honor?

21 THE COURT: All right, Mr. Curran.

22 BY MR. CURRAN:

23 Q Mr. Barnaba, directing your attention to the
24 second page of Government's Exhibit 66 for identification,
25 and specifically the three lines beginning:

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"Inglese: Nah - tremendous figures.

"Barnaba: How much?

"Inglese: 41, 42. If anything, I will
see you."

What did you understand the defendant to be
referring to there?

MRS. ROSNER: Objection.

THE COURT: Sustained.

MR. CURRAN: If your Honor will bear with me,
please.

THE COURT: Yes.

(Pause.)

MR. CURRAN: No further questions.

THE COURT: Ladies and gentlemen, I am
turning you over to the marshal. I hope you have a
pleasant evening tonight.

(The jury left the courtroom.)

THE COURT: The record should reflect that
after the transcripts were collected from the jury I
counted them just to make sure. There were 18. We
got them all back.

Mrs. Rosner?

MRS. ROSNER: I want the record to be clear
that I also predicated my objections to the admissibility

of the tape on the grounds of not a proper foundation.

THE COURT: It was on the record.

..... Mr. Fisher, you have a problem about being here tomorrow.

Does anybody else have a problem?

MR. SUNDEN: Judge, only if the circumstances arise that I have some other matters in the state court to take care of, but they are not pressing. I was only going to inquire if it turns out Mr. Fisher must proceed with his argument tomorrow, will the court perhaps proceed with other business that might not be relevant to Mr. Fisher's client or do you think we will take a brief recess in the early part of the morning?

THE COURT: I think Mr. Fisher might feel that he was prejudiced if we went ahead with anything else involving this case and under the circumstances I wouldn't do it.

MR. CURRAN: Your Honor, might I suggest for at least consideration by the court, since applications are finished for today --

THE COURT: Mr. Fisher was just about to get up.

MR. CURRAN: I can make it anyway, I

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suppose. We start with a quarter of 10 with the jury and that might help Mr. Fisher with his problem later in the morning.

THE COURT: I want to talk to the judges on the Court of Appeals and I want to make sure I get them.

We will set it for 10.

5B 1 kpl 1890
2 MR. FISHER: If your Honor please, prior to
3 commencement of the cross-examination tomorrow, may I
4 through your Honor call upon the government to produce
5 for the defendants' inspection the precise equipment,
6 whatever it was, that was allegedly used to make this
7 tape.

8 I am including but not limited to, whatever tape
9 recorder and/or transmitting device, whatever aerial that
10 was used, if any, whatever receiver was used, if any,
11 whatever tape recorder that may have been connected to any
12 receiver, if any, any logs regarding the receipt of the
13 transmission, and most particularly, your Honor, any and
14 all records relating to the use of a Kel, Nagra, Fargo,
15 whatever surreptitious surveillance-type device used by
16 Barnaba in the course of this investigation.

17 Secondly, if your Honor please, I call upon the
18 government now, lest we get sandbagged again, that to
19 disclose whether or not it happened that Mr. Cassella,
20 acting as an undercover agent was introduced to my client
21 at any point subsequent to November 14, 1972, to and
22 including the present date and, if such an occurrence
23 had, to turn over any and all 3500 material that would
24 relate to such a meeting.

25 MRS. ROSNER: It is Rule 16.

2 MR. FISHER: It is also 3500, Mrs. Rosner, in
3 view of the fact the witness did testify now with regard
4 to post, his post-arrest meetings, at least one he claims
5 with the defendant Christiano.

6 MR. CURRAN: Your Honor, we have no Rule 16
7 material. There is no 3500 material and if Mr. Fisher
8 wants a specific answer to that question, I suggest he
9 ask either Mr. Barnaba or perhaps Mr. Cassella at the
10 appropriate time.

11 Going back to his first one, we will endeavor
12 to inform --

13 THE COURT: Is that something that you can work
14 out with Mr. Fisher?

15 MR. CURRAN: I think we can.

16 MR. WARNER: I have an application that I would
17 like to make in chambers after this is over, but I would
18 ask that Mr. Phillips or Mr. Curran be present and the
19 court reporter be present. ---

20 THE COURT: All right, gentlemen, 10 o'clock in
21 the morning.

22 (In the robing room.)

23 MR. WARNER: Your Honor, this is an application
24 on behalf of myself and my client to be excused for
25 tomorrow and perhaps the day after. The reason for it

1 kp3

2 is as follows:

3 During the course of the direct, the People's
4 case, certain complications have arisen and certain
5 indications were made by some of the witnesses that
6 concerns our direct case, and it is necessary for me to
7 go out and visit some of the people that we may be
8 calling when we put on our direct case whatever we put on.

9 Because of the trial schedule, and I suspect
10 we would be meeting this Saturday --

11 THE COURT: I don't know.

12 MR. WARNER: Even if we don't, it is still
13 extremely difficult for me to get hold of these people on
14 a Saturday or Sunday because I could only get them at
15 work.

16 I spoke with Mr. Phillips. He indicated to
17 me that it is not the People's intention to elicit any
18 direct testimony from the witnesses who are going to be
19 called tomorrow and the day after that concerns my client.

20 I have also perused all of the 3500 material
21 and find no reference to my client at all.

22 It will be a great inconvenience, and may very
23 well be a prejudice to my client if we are both not able
24 to go out and make this preparatory work.

25 Of course, I have contacted people prior to the

1 kp4

2 trial, I don't mean this is my first expedition out to
3 prepare our direct case, but now that we are nearing the
4 time when defense will be putting on its case, this time
5 is very, very important to me, so I would ask with the
6 consent of the defendant to be absent, that I be excused
7 and that he be excused, and of course I will have someone
8 covering for me.

9 MR. PHILLIPS: We oppose the application.
10 It is the first time I have ever heard of an application
11 to allow a defendant and defense counsel to be absent
12 during the course of the trial so they could go out and
13 interview witnesses. I don't think Mr. Warner seriously
14 contends that he was surprised by the government's evidence
15 as it was introduced against his client. I think he has
16 had ample opportunity to contact witnesses prior to trial
17 and during the trial, at the close of the court hours,
18 and the number of days we didn't even sit.

19 MR. WARNER: Not subsequent to Stasi's testi-
20 mony.

21 MR. PHILLIPS: I would oppose it. I think all
22 defendants at the least should be present and either
23 their counsel or someone or other lawyers be present
24 covering for them.

25 MR. WARNER: If Mr. Phillips is opposing on

1 kp5

2 the ground it is the first time it has ever been made,
3 I don't think he seriously contends to push that.

4 As far as it being an interruption for the trial,
5 one of the reasons I did make it in chambers, I didn't want
6 to make it an open application where everybody would be
7 joining in.

8 I think I made a restricted narrow application
9 and as far as not being surprised by the testimony of
10 Frank Stasi, there was certain testimony that I could not
11 possibly have expected in its precise nature.

12 I knew the general nature of his testimony, but
13 not precisely what would come out.

14 THE COURT: Mr. Warner, I am tremendously
15 reluctant to permit both of you to leave at this time.
16 I think the defendant should stay and if anything should
17 come up, whoever is covering for you, a defendant should
18 be able to talk to him and if necessary, that lawyer can
19 get up and say, "Judge, can we wait, Mr. Warner is absent,"
20 so on and so forth.

21 Then I think defendant gets a reasonable break.
22 If you have to go out at this point to interview witnesses,
23 and I can understand it, I am not overjoyed about it, but
24 I understand it.

25 MR. WARNER: Neither am I.

1 kp5a

2 THE COURT: You arrange to have an attorney come
3 in and cover for you.

4 Thank you, gentlemen.

5 (Adjourned to February 13, 1974, at 10.00 a.m.)
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